84-292

No.

Office - Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS F. O'MALLEY
and
ANDREW G. MASSA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM G. HUNDLEY
HUNDLEY & CACHERIS, P.C.
1914 Sunderland Place, N.W.
Washington, D.C. 20036
(202)293-0224
Counsel for Petitioner O'Malley

ROBERT M. STEPHENSON
COTSIRILOS & CROWLEY, LTD.
33 North Dearborn Street
Suite 930
Chicago, Illinois 60602
(312)263-0345
Counsel for Petitioner Massa

Pandick Midwest, Inc., Chicago • (312) 454-7600

QUESTION PRESENTED

Whether a district court violated the Federal Wiretap Statute, 18 U.S.C. §§ 2510(11), 2515 and 2518(10)(a), and applicable precedent when it denied two criminal defendants, who were named targets in a court order authorizing oral interception of conversations and whose conversations were, in fact, intercepted, standing to move to suppress their intercepted conversations on the basis that the government, prior to obtaining a court order authorizing oral interceptions, surreptitiously and unlawfully entered the premises where the conversations took place and seized information about the security system, all of which led to the later installation of oral monitoring devices.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CITATIONS	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. The Decision Below Violates The Federal Wiretap Statute And An Opinion Of This Court By Allowing The Use of Unlawful Surreptitious Entries Prior To Obtaining Court Authorization For The Purpose Of Acquiring Information Designed To Facilitate The Placement Of Electronic Monitoring Equipment In A Premises So That Conversations Of Targeted Individuals Will Be Intercepted After Court Authorization Is Obtained Therefor	7
II. The Decision Below, In Contravention Of Opinions Of This Court And The Courts Of Appeals Which Have Considered The Question, Undermines The Congressionally Intended Application Of The Federal Wiretap Statute To Persons Whose Conversations Are Intercepted Under The Statute	13
CONCLUSION	18
APPENDIX:	
Court of Appeals Opinion decided June 8, 1984	1a
District Court Opinion dated June 17, 1983	41a
Court of Appeals Order denying petition for rehearing and suggestion for rehearing *en banc* dated July 12, 1984	81a

TABLE OF CITATIONS

Cases

	PAGE
Anthony v. *United States*, 667 F.2d 870 (10th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2959, 73 L.Ed.2d 1350 (1982)	17
Dalia v. *United States*, 441 U.S. 238 (1979)	8, 9, 10, 11
Gelbard v. *United States*, 408 U.S. 41 (1972)	8, 9, 10, 14, 15
Irvine v. *California*, 347 U.S. 128 (1954)	12
United States v. *Calandra*, 414 U.S. 338 (1974)	13, 14
United States v. *Chase*, 692 F.2d 69 (9th Cir. 1982)	12
United States v. *Dorfman*, 690 F.2d 1217 (7th Cir. 1982)	15, 16, 17
United States v. *Fury*, 554 F.2d 522 (2d Cir. 1977), *cert. denied*, 436 U.S. 931 (1978)	12
United States v. *Giordano*, 416 U.S. 505 (1974)	8
United States v. *Hanier*, 652 F.2d 1374 (10th Cir. 1981)	12
United States v. *Scafidi*, 564 F.2d 635 (2d Cir. 1977)	11
United States v. *Williams*, 580 F.2d 578 (D.C. Cir.), *cert. denied*, 439 U.S. 832 (1978)	12
United States v. *Wright*, 524 F.2d 1100 (2d Cir. 1975)	12

Statutes

18 U.S.C. § 2510(11)	2, 8
18 U.S.C. § 2511(1)	8

	PAGE
18 U.S.C. § 2515	3, 8, 14, 15
18 U.S.C. § 2518	5
18 U.S.C. § 2518(4)	9, 10
18 U.S.C. § 2518(5)	10
18 U.S.C. § 2518(6)	10
18 U.S.C. § 2518(9)(d)	10
18 U.S.C. § 2518(10)(a)	2, 8
18 U.S.C. § 2518(10)(a)(i)	10
18 U.S.C. § 2518(10)(a)(iii)	10
18 U.S.C. § 2520	8
28 U.S.C. § 1254(1)	2

Other Provisions

S.Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968)	13
S.Rep. No. 1097, 90th Cong., 2d Sess. 96 (1968)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS F. O'MALLEY
and
ANDREW G. MASSA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Thomas F. O'Malley and Andrew G. Massa, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 8, 1984.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, appears in the Appendix hereto. (App. 1a-40a). The District Court also rendered an opinion with respect to the question presented herein, which is reported at 565 F.Supp. 353 (N.D. Ill. 1983), and appears in the Appendix hereto. (App. 41a-80a).

The decision of the United States Court of Appeals for the Seventh Circuit denying a Petition For Rehearing And Suggestion For Rehearing *En Banc*, entered on July 12, 1984, is not yet reported and is included in the Appendix hereto. (App. 81a).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 8, 1984. A timely Petition For Rehearing And Suggestion For Rehearing *En Banc* was denied on July 12, 1984, and this Petition For Certiorari was filed within 40 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2510(11) of Title 18, the Federal Wiretap Statute:

> As used in this chapter—"aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Section 2518(10)(a) of Title 18, the Federal Wiretap Statute:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

Section 2515 of Title 18, the Federal Wiretap Statute:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

STATEMENT OF THE CASE

Petitioners, along with Allen Dorfman, Roy L. Williams and Joseph Lombardo,[1] were convicted of conspiracy to bribe a United States Senator, 18 U.S.C. § 371, interstate travel to promote the bribery, 18 U.S.C. § 1952, and wire fraud, 18 U.S.C. § 1343. During the trial, the government introduced into evidence eleven tape recorded conversations which were

[1] Both Williams and Lombardo have or will file petitions for certiorari. Petitioners, by separate motion, will move to adopt the questions presented therein as additional grounds for challenging their convictions.

overheard in the offices of Allen Dorfman through monitoring devices surreptitiously placed therein by the government. These conversations formed the basis for petitioners' convictions.

The interception of oral conversations in the Dorfman offices was part of the longest electronic surveillance in the history of the country. It continued over a one year period. The surveillance included the interception of both wire and oral communications. The interception of wire communications began on January 30, 1979, pursuant to a court order, and continued pursuant to extensions of the January 30 order through June, 1979. The interception of oral communications involved the monitoring of conversations in the Dorfman offices. These interceptions began after an April 7, 1979 order was entered authorizing the interceptions and continued through January, 1980, pursuant to extensions of the April 7 order. As a result of the wire interceptions, the government targeted petitioners as subjects of the later monitoring of oral communications in the Dorfman offices.

The government application for the April 7 order alleged that there was probable cause to believe that petitioners, Dorfman, Lombardo and others were engaged in several offenses, that Dorfman's office had been used and was being used by the named individuals, including petitioners, in connection with the described offenses and that, if the court allowed the requested surveillance of Dorfman's office, conversations of the named individuals relating to these offenses would be intercepted. The government application contained a written authorization from the then Assistant Attorney General of the Criminal Division of the Department of Justice authorizing the application for the requested surveillance. That authorization directed that the government's application include a request to enter Dorfman's office and the building in which it was housed surreptitiously for the purpose of installing electronic surveillance devices. In accordance with the Depart-

ment of Justice authorization, the April 7 application "requested that the order authorize entry of [Dorfman's office] for the purpose of installing . . . any electronic oral interception devices utilized pursuant to the authority granted by [the court's] order." April 7 application at 19.

On April 7, 1979, the judge before whom the government filed its April 7 application granted the application. An order resulted permitting the surveillance and the surreptitious entries which the government requested. The order named petitioners as well as Dorfman and Lombardo as targets of the surveillance. Interceptions began occurring from Dorfman's office on April 13, 1979 and continued thereafter through January, 1980. The interceptions included petitioners' conversations, some of which were introduced at trial. Petitioners' convictions resulted.

After petitioners were sentenced, they filed a motion for a new trial based on newly discovered evidence.[2] The newly discovered evidence constituted the sworn statement of H. Edward Tickel, a former FBI agent who worked in the Technical Services Division Operational Support Unit at FBI Headquarters in Washington, D.C. While employed with the FBI, Tickel's main function was to gain surreptitious entry into buildings for, among other things, the placement of monitoring devices. According to Tickel, he, along with other FBI agents, unlawfully entered the building in which Dorfman's office was housed and Dorfman's office, including the alarm room located nearby, at night prior to the acquisition of the April 7 court order. The purpose of the entries was to inspect the security system guarding Dorfman's office and to gather information about it, which then could be used to develop a method to defeat the system. Thereafter, when a court order was obtained specifically authorizing the surreptitious placing of electronic monitoring devices in Dorfman's office, the devices could be placed without triggering the security system.

---

[2] Section 2518 of the Federal Wiretap Statute specifically provides for challenging the legality of electronic surveillance after trial when the grounds for the challenge were not known prior thereto.

During the unlawful entries, Tickel obtained information which the government used to later defeat the security system around Dorfman's office. That, in turn, enabled the government to place monitoring devices in Dorfman's office. Without the information gathered by Tickel, the monitoring devices which intercepted petitioners' conversations never would have been placed in Dorfman's office. Succinctly, Tickel's unlawful entries occurred to further, and did further, the government's plan to place monitoring devices in Dorfman's office to transmit, among other things, the conversations of petitioners for recording purposes. At the time of the unlawful entries, the government had already targeted petitioners for interception in the Dorfman offices.

The District Court denied petitioners' motion for new trial, in part, because, they lacked standing under the Federal Wiretap Statute to suppress the fruits of the alleged unlawful conduct. The court stated:

> Nothing in Title III governs Tickel's conduct directly; Title III governs only electronic surveillance. Nothing in the statute governs unlawful entries of property. Thus, Title III does not afford defendants standing to challenge the unlawful entries in themselves. Defendants therefore can argue only that their conversations were unlawfully intercepted because the interceptions were made possible by Tickel's earlier unlawful conduct which they do not have standing to challenge under Title III or the Constitution. This is exactly the same as the fruits of the poisonous tree argument we rejected above, and it must be rejected here as well. The suppression remedy contained in Title III was intended to be construed consistently with fourth amendment principles of standing.

(App. at 63a). The Court of Appeals affirmed the district court order denying petitioners' motion for new trial solely on the basis that they lacked standing to object to the contested conduct. The Court stated:

> Tickel's alleged searches did violate Allen Dorfman's rights but these searches, which the defendants contend

> mandate suppression of the electronic evidence, "did not infringe their fourth amendment rights."
>
> Under both Fourth Amendment principles and Title III law, a defendant may not obtain the exclusion of evidence on the ground that someone else's rights were violated. In other words, a defendant may assert only his own rights. Consequently, a defendant may not successfully challenge the admissibility of evidence on the basis that the evidence is tainted (or "the fruit of") some past infringement of another's rights.

(App. at 38a).

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW VIOLATES THE FEDERAL WIRETAP STATUTE AND AN OPINION OF THIS COURT BY ALLOWING THE USE OF UNLAWFUL SURREPTITIOUS ENTRIES PRIOR TO OBTAINING COURT AUTHORIZATION FOR THE PURPOSE OF ACQUIRING INFORMATION DESIGNED TO FACILITATE THE PLACEMENT OF ELECTRONIC MONITORING EQUIPMENT IN A PREMISES SO THAT CONVERSATIONS OF TARGETED INDIVIDUALS WILL BE INTERCEPTED AFTER COURT AUTHORIZATION IS OBTAINED THEREFOR

Congress enacted the Wiretap Statute to define the narrow circumstances in which wiretapping and all other forms of electronic surveillance would be allowed. The statute authorizes the interception of wire and oral communications only by law enforcement officials investigating specific crimes after judicial approval is obtained based upon a stringent showing of, among other things, probable cause and that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too

dangerous. Moreover, to insure that electronic surveillance would not be routinely employed in criminal investigations, the statute requires that, before judicial approval is sought, the authorization of a responsible Department of Justice official be obtained.

The clear purpose of the statute was to prohibit all interceptions of oral and wire communications, except those authorized by it.[3] If a wire or oral communication is intercepted in accordance with the statute, the contents of the communication may be disclosed and used in various proceedings. On the other hand, unauthorized interceptions, either wire or oral, and the disclosure or use of information obtained through unauthorized interceptions are crimes,[4] the victims of which are entitled to recover civil damages therefor.[5] Moreover, the statute bars the use of the interceptions before courts and other official bodies.[6] To that end, the statute provides procedures for moving to suppress unlawfully intercepted communications[7] and, in doing so, specifies the "aggrieved" persons entitled to challenge the legality of the interceptions. Specifically, a person who was a party to any wire or oral communication or a person at whom the interception was directed may move to suppress communications unlawfully intercepted.[8]

The provisions of the Federal Wiretap Statute govern the use of surreptitious entries into places for the purpose of installing electronic monitoring equipment. In *Dalia* v. *United States,* 441 U.S. 238 (1979), defendant contended that Congress, in enacting the statute, "[did] not [give] the courts statutory authority to approve covert entries for the purpose of

---

[3] United States v. Giordano, 416 U.S. 505, 514 (1974); Gelbard v. United States, 408 U.S. 41, 46 (1972).

[4] 18 U.S.C. § 2511(1).

[5] 18 U.S.C. § 2520.

[6] 18 U.S.C. § 2515.

[7] 18 U.S.C. § 2518(10)(a).

installing electronic surveillance equipment . . ." since "there is no indication in the statute that covert entry ever may be ordered." 441 U.S. at 249. Thus, defendant moved to suppress evidence obtained through the interception of conversations by means of a device installed surreptitiously in his office. This Court rejected defendant's argument, stating:

> Those considering the surveillance legislation understood that, by authorizing electronic interception of oral communications in addition to wire communications, they were necessarily authorizing surreptitious entries.
>
> . . . Congress' purpose in enacting the statute would be largely thwarted if we were to accept [defendant's] invitation to read into [the Statute] a limitation on the court's authority . . . . Congress permitted limited electronic surveillance under [the Statute] because it concluded that both wiretapping and bugging were necessary to enable law enforcement authorities to combat successfully certain forms of crime. Absent covert entry, however, almost all electronic bugging would be impossible . . . .
>
> . . . [W]e conclude that *Congress* clearly understood that it *was conferring power upon the courts to authorize covert entries ancillary to their responsibility to review and approve surveillance applications under the statute.*

441 U.S. at 252-54. (Emphasis added). Succinctly, the Federal Wiretap Statute, in addition to empowering courts to authorize electronic surveillance in limited situations, also empowered courts, once the stringent requirements of the statute were met, to authorize the means to accomplish the surveillance, including the use of covert entries for the purpose of installing monitoring devices. It necessarily follows that Congress also empowered the courts to restrict the means used to accomplish a surveillance.[9] In each case, the question for the

---

[9] The court order authorizing the surveillance must particularize the extent and nature of the interceptions. 18 U.S.C. § 2518(4). Similarly, the statute, in numerous instances, provides the court with

(Footnote continued on following page)

court is what means is reasonable under the circumstances to accomplish the requested surveillance. 441 U.S. at 249. If the government exceeds the means dictated by the court to accomplish the surveillance, grounds would then exist to challenge the legality of interceptions which occurred as a result of the monitoring.[10] For even greater reasons, if surreptitious entries are made before a court order for surveillance is obtained for the purpose of aiding the government in installing monitoring devices after a court order is entered, those entries, made in connection with the requested surveillance, fall within the purview of the statute and the court's supervisory power over the surveillance. The entries would be no different than actual electronic monitoring occurring prior to entry of a court order. To hold otherwise would force "courts . . . [to] become partners of illegal conduct,"[11] which the statute was specifically drafted to avoid, and defeat their power to review and approve surveillance applications. Accordingly, a person who was a party to a conversation intercepted over monitoring devices installed as a result of surreptitious entries prior to the order authorizing the interception would have standing to move to suppress the conversation, charging that it was unlawfully intercepted. The same, of course, would be true for a person

---

(Footnote continued from preceding page)

discretionary power concerning how the surveillance should be conducted. Thus, the court can determine the time period in which the surveillance is to occur so long as it does not exceed thirty days. 18 U.S.C. § 2518(5). Similarly the court can require the filing of progress reports detailing the results of the surveillance. 18 U.S.C. § 2518(6). Moreover, the court can determine the person to whom notice of the surveillance should be sent after its termination, including what materials should be made available to those who receive notice. 18 U.S.C. § 2518(9)(d). Finally, the court can direct a landlord or other custodian of the premises to be surveilled to render the government assistance in making surreptitious entry. 18 U.S.C. § 2518(4).

[10] 18 U.S.C. § 2518(10)(a)(i) and (iii).

[11] Gelbard v. United States, 408 U.S. 41, 51 (1972).

against whom the interception was directed—namely, a target of the surveillance.[12]

Here, petitioners, based upon the admissions of an agent who participated in the conduct, alleged that agents of the FBI, prior to obtaining a court order authorizing interception of their conversations, unlawfully entered the premises in which those conversations took place to gather information which the government intended to use to defeat the security system of the premises and thereby allow it to successfully install monitoring devices in the premises. Thereafter, petitioners alleged that the government used information seized during the unlawful covert entries to defeat the security system which allowed the government to place the monitoring devices in the premises after a court order was obtained. As a consequence, the government intercepted petitioners' conversations. Finally, petitioners alleged that because of the unlawful entries, the government intercepted their conversations. Despite petitioners' allegations, they were denied standing under the Federal Wiretap Statute to

---

[12] The District Court, in denying defendants' standing, stated that the Wiretap Statute did not govern unlawful entries of property for the purpose of installing electronic monitoring equipment. (App. at 63a). In so stating, the court relied on United States v. Scafidi, 564 F.2d 635 (2d Cir. 1977), a case decided before this Court's opinion in *Dalia*. Interestingly, that court, in the context of discussing whether certain defendants had standing "to object to allegedly unauthorized entries to place or recharge the bugs," said "[w]hatever the exact, technical interests, or lack thereof, which these [defendants] had in the premises entered by the agents, it seems artificial to say that a person overheard, whose conversation would not have been overheard but for the entry, has no standing to move to suppress the conversations on a claim that the entry was improper." 564 F.2d at 638-39. In light of *Dalia*, the Wiretap Statute clearly accords standing to a person whose conversation is overheard to challenge the interception because it resulted from an unlawful entry, during which the monitoring device making the interception was placed or information was seized to allow the government to later install the monitoring device.

challenge the interception of their conversations as a result of the unlawful entries. This result undercuts the privacy interests in communications and compels courts to condone conduct condemned by this Court in *Irvine* v. *California*, 347 U.S. 128, 132 (1954), as follows:

> Each of these repeated entries . . . without a search warrant or other process was a trespass, and probably a burglary, for which any unofficial person should be, and probably would be, severely punished. . . . That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversations of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."[13]

---

[13] The decision below relied on five cases in denying petitioners' standing to challenge the interception of their conversations. Each case, unlike this case, involved a prior incident, *occurring separate and apart from the conduct which defendants in those cases directly challenged, to which defendants had no standing to object* under either the Wiretap Statute or the Fourth Amendment. United States v. Fury, 554 F.2d 522 (2d Cir. 1977), *cert. denied*, 436 U.S. 931 (1978) (prior unlawful wiretap of which defendant was not a target or during which defendant was not recorded); United States v. Williams, 580 F.2d 578 (D.C. Cir.), *cert. denied*, 439 U.S. 832 (1978) (same); United States v. Wright, 524 F.2d 1100 (2d Cir. 1975) (same); United States v. Chase, 692 F.2d 69 (9th Cir. 1982) (unlawful detention of co-defendant from which exigent circumstances were developed to conduct a warrantless search of defendant's home, cannot serve as a basis for attacking subsequent search without evidence that purpose of unlawful detention was to gain entry into house); United States v. Hanier, 652 F.2d 1374 (10th Cir. 1981) (no

(Footnote continued on following page)

II

THE DECISION BELOW, IN CONTRAVENTION OF OPINIONS OF THIS COURT AND THE COURTS OF APPEALS WHICH HAVE CONSIDERED THE QUESTION, UNDERMINES THE CONGRESSIONALLY INTENDED APPLICATION OF THE FEDERAL WIRETAP STATUTE TO PERSONS WHOSE CONVERSATIONS ARE INTERCEPTED UNDER THE STATUTE

Though the legislative history of the Federal Wiretap Statute and the exclusionary remedy contained therein show that Congress intended they generally "reflect existing law,"[14] the statute and its provisions clearly evidence a "congressional effort to afford special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance."[15] Unlike in the Fourth Amendment context, where the invasion of privacy is completed when an unlawful intrusion has been effected, the interception of communications involves an added privacy intrusion through the disclosure or use of the information after its seizure. Thus, in enacting the Wiretap Statute, Congress intended its provisions to act not only as a deterrent to future unlawful conduct as in the Fourth Amendment cases, but also as a protection against the unauthorized disclosure of seized information. To that effect, the statute expressly provides that communications intercepted in violation of its provisions may not "be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political

---

(Footnote continued from preceding page)

standing of one defendant to object to search of motel room wherein he had no expectation of privacy). Here, of course, the entire purpose of the unlawful entries was to gather information to facilitate the interception of petitioners' conversations.

[14] S.Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968).

[15] United States v. Calandra, 414 U.S. 338, 355 n. 11 (1974).

subdivision thereof."[16] This prohibition is central to the statute. As the legislative history relates:

> [The statute] imposed an evidentiary sanction to compel compliance with [its provisions]. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or authority of the United States, a State or a political subdivision of a State, where the disclosure of that information would be in violation of [the statute].
>
> ... [I]t is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications.

S.Rep. No. 1097, 90th Cong., 2d Sess. 96 (1968). (Citations omitted). The exclusionary provision of the Wiretap Statute, of course, far exceeds the judicially crafted exclusionary provision of the Fourth Amendment.[17]

This Court recognized the broader scope of the Wiretap Statute in *Gelbard* v. *United States,* 408 U.S. 41 (1972). There, the Court held that "grand jury witnesses ... are entitled to invoke the prohibition of § 2515 as a defense to contempt charges brought against them for refusing to testify.[18] In so holding, the Court emphasized that an unauthorized disclosure of seized information amounted to a separate injury to the victim's privacy interest [19] and that "§ 2515 [of the statute] serves not only to protect the privacy of communications, but

---

[16] 18 U.S.C. § 2515.

[17] United States v. Calandra, 414 U.S. 338 (1974).

[18] Gelbard v. United States, 408 U.S. at 43.

[19] Gelbard v. United States, 408 U.S. at 51.

also to ensure that the courts do not become partners in illegal conduct . . . ."[20] Thus, the Court reasoned that § 2515 which played a crucial role in protecting against the use of disclosure of communications that have been illegally seized, allowed a grand jury witness to refuse to testify where his testimony was sought on the basis of illegal electronic surveillance. Otherwise, "disclosure through compelled testimony [of unlawfully monitored communications would make] the witness the victim, once again, of a federal crime."[21]

Premised on this Court's decision in *Gelbard,* the Seventh Circuit Court of Appeals in *United States* v. *Dorfman,* 690 F. 2d 1217 (7th Cir. 1982), accorded six nonparties to the case standing to challenge the legality of intercepted conversations. The facts of the case merit review. There, six nonparties who were either targets of the electronic surveillance or intercepted during the surveillance filed motions to suppress the intercepted conversations in which they participated. Of the six persons, the government intended to call one as a witness. The district court denied the motions, holding that, since the challenged conversations were not being used against the movants at trial, they had no standing to move to suppress the conversations under the Wiretap Statute. The district court reasoned that a person against whom no evidence is offered cannot seek the application of the Fourth Amendment's exclusionary rule. Thus, since the Wiretap Statute "does not grant a suppression remedy broader than that encompassed in general fourth amendment law," the nonparty movants could not seek suppression of their intercepted conversations under the statute. 690 F. 2d at 1221.

On appeal, the Court of Appeals affirmed the district court's order denying the nonparties' motion to suppress. In doing so, however, the Court "narrow[ed] the bases of [the district court's] dispositions."[22] Interpreting the district court's

---

[20] Gelbard v. United States, 408 U.S. at 51-52.

[21] Gelbard v. United States, 408 U.S. at 52.

[22] United States v. Dorfman, 690 F.2d at 1225.

order as "an absolute bar (at least in criminal trials) to nonparty standing under the [wiretap] statute," the Court held that the statute's suppression remedy was "not simply coextensive with" the Fourth Amendment exclusionary rule.[23] Rather, the suppression remedy of the statute, in addition to deterring future unlawful interceptions by punishing the initial invasion of privacy, also was intended to protect "against the use or disclosure of communications that have been illegally seized."[24] "This point [according to the Court was] critical because under [the statute], unlike the Fourth Amendment, the invasion of privacy is not simply 'over and done with' when an unlawful intrusion has been effected. Rather, the disclosure or use of information obtained through such an intrusion amounts to a separate injury to the victim's privacy interest."[25] Thus, the Court said that ". . . a no-standing decision based on a movant's nonparty status must be responsible in some way to the risk of disclosure of unlawfully seized communications."[26]

Analyzed against the risk of disclosure, the Court found that the district court did not err when it held that the nonparty movants, all of whom constituted aggrieved persons under the Wiretap Statute, had no standing to move to suppress their conversations, because "even without the involvement of the nonparties, the defendants were able to test the legality of the interceptions of all the communications that the government intends to use at trial."[27] Thus, the nonparties' interests in disclosure were safeguarded. The only thing of which they were deprived by the district court denying them standing was an opportunity to relitigate the legality of the interceptions of their conversations. Under these circumstances, the legislative

---

[23] United States v. Dorfman, 690 F.2d at 1227-28.
[24] United States v. Dorfman, 690 F.2d at 1228.
[25] United States v. Dorfman, 690 F.2d at 1228.
[26] United States v. Dorfman, 690 F.2d at 1229.
[27] United States v. Dorfman, 690 F.2d at 1229.

purpose of the Wiretap Statute was protected.[28] However, absent the opportunity to test the legality of interceptions against claims of unlawfulness, the Court, in construing the Wiretap Statute, found that the statute accorded nonparties who constituted aggrieved persons standing to challenge the interception of their conversations.[29]

The decision below, in denying petitioners' standing to move to suppress the interception of their conversations, based upon the prior illegal entries, during which information was seized that led to the installation of the monitoring devices that intercepted the conversations, fails to address the risk of unauthorized disclosure at which the Federal Wiretap Statute is directed. Specifically, the no-standing decision denies petitioners the opportunity to challenge the legality of their interceptions based upon admitted wilfull misconduct in obtaining the interceptions. Unlike in *Dorfman,* neither petitioners, both of whom are aggrieved parties under the statute, nor any other party are capable of challenging the legality of the interceptions of their conversations based on the decision below. As a result, the decision below violates the Federal Wiretap Statute and prior court precedent.

---

[28] The Court of Appeals found particularly significant the fact that one interceptee, who had a proprietary interest in the premises surveilled, "had 'standing to object to the conduct of the surveillance as a whole.'" 690 F.2d at 1229 n. 19. Here, no one, other than petitioners, is available to attack the legality of the challenged interceptions.

[29] *See also* Anthony v. United States, 667 F.2d 870 (10th Cir. 1981), *cert. denied,* ____ U.S. ____, 102 S.Ct. 2959, 73 L.Ed. 2d 1350 (1982), wherein the Tenth Circuit Court of Appeals accorded a nonparty standing to object to the disclosure of challenged interceptions.

CONCLUSION

For the foregoing reasons, a write of certiorari should issue to review the opinion of the United States Court of Appeals for the Seventh Circuit affirming the trial court's denial of petitioners' motion for a new trial based on newly discovered evidence.

Respectfully submitted,

WILLIAM G. HUNDLEY
HUNDLEY & CACHERIS, P.C.
1914 Sunderland Place, N.W.
Washington, D.C. 20036
(202)293-0224
Counsel for Petitioner O'Malley

ROBERT M. STEPHENSON
COTSIRILOS & CROWLEY, LTD.
33 North Dearborn Street
Suite 930
Chicago, Illinois 60602
(312)263-0345
Counsel for Petitioner Massa

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 83-1642, 83-1643, 83-1644, 83-1660,
83-2206, 83-2207, 83-2208, 83-2229

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROY L. WILLIAMS, THOMAS F. O'MALLEY,
ANDREW G. MASSA, JOSEPH LOMBARDO,

Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 81 CR 269—Prentice H. Marshall, *Judge.*

ARGUED JANUARY 5, 1984—DECIDED JUNE 8, 1984

Before ESCHBACH, POSNER and COFFEY, *Circuit Judges.*

ESCHBACH, *Circuit Judge.* Roy Williams, Joseph Lombardo, Thomas O'Malley, and Andrew Massa appeal from convictions on all 11 counts of an indictment charging conspiracy to bribe a United States Senator, 18 U.S.C. § 371, interstate travel to promote the bribery, 18 U.S.C. § 1952, and wire fraud, 18 U.S.C. § 1343. Only Lombardo attacks the sufficiency of the evidence. All defendants, however, contend that the district court erred (1) in denying a motion to suppress evidence obtained through electronic surveillance, (2) in ruling on several evidentiary

matters, (3) in handling ex parte juror contacts, (4) in instructing the jury, and (5) in denying a request for a new trial. Finding no merit in these contentions, we affirm.

I.

Many aspects of this case are extraordinary. For instance, the trial lasted nearly two months, and the jury charge an hour and a half. Moreover, the parties made over 200 written motions to the district court, which gave each motion individual attention. Amid this complexity, the government's theory of criminal culpability is strikingly clear: the defendants, Allen Dorfman,[1] and William Webbe, an unindicted co-conspirator, devised and pursued a scheme to bribe a United States Senator at the expense of the Teamsters' Central States Pension Fund.[2] Viewing the evidence in the government's favor, *see Glasser v. United States*, 315 U.S. 60, 80 (1942), we now describe the events that support this charge and the defendants' convictions.

The Teamsters' Central States Pension Fund ("Pension Fund" or "Fund") is an organization created by and funded pursuant to collective bargaining agreements between the Teamsters Union and employers. As the name implies, the Pension Fund pays benefits to retired union members. In 1972, the Pension Fund acquired what is known as the Wonderworld property—a 5.8 acre plot of land in Las Vegas, Nevada. The Pension Fund, however, lost direct control over the management and disposition of this property in 1977, when the Victor Palmieri Company ("Palmieri") was retained to manage the Fund's real estate assets. The Pension Fund's trustees, as part of an

---

[1] Dorfman was named, and found guilty as charged, in all counts of the indictment. He was murdered prior to sentencing and the case against him was dismissed as moot. In this opinion, the term "defendants" will refer to the appellants, not Dorfman.

[2] The full name of this entity is "Central States, Southeast and Southwest Areas Pension Fund."

effort to retain the Fund's tax-exempt status, relinquished managerial control to Palmieri and retained only the right to monitor Palmieri and to remedy breaches of fiduciary duties.

In 1978, when Palmieri decided to sell the Wonderworld property, nearby homeowners became concerned that a high-rise building would be constructed on the land. The homeowners thus organized and selected as their spokesman Senator Howard Cannon, whose home was across the street from the Wonderworld property. The group decided to purchase the land with a view toward having the property "down-zoned." At a homeowners' meeting, Senator Cannon offered to call Allen Dorfman to discover whether the group could buy the property directly from the Pension Fund. At the time, Allen Dorfman was not formally associated with the Fund; however, his insurance company, which had offices in the same building that housed the Pension Fund, previously insured many of the Fund's assets. Senator Cannon also suggested that his son-in-law, Robert Bjornsen, could serve as the group's agent for the Wonderworld transaction. The homeowners agreed and Bjornsen initiated contacts with Palmieri in late December of 1978.

On January 8, 1979, Palmieri invited sealed bids from parties who had expressed interest in the Wonderworld property. The bid-solicitation letter stated several conditions, including that the minimum bid was $1,400,000. Before Bjornsen submitted a bid on benalf of the homeowners, however, Senator Cannon met in his Las Vegas office with Allen Dorfman, Roy Williams, then an international vice-president of the Teamsters Union,[3] and Edward Wheeler, a lawyer who represented the Teamsters on legislative matters.

---

[3] Roy Williams subsequently became the international president of the Teamsters, but resigned that position as a condition to remain free pending appeal. *See United States v. Williams*, 565 F. Supp. 350, 353 n.1 (1983).

At this meeting, which occurred on January 10, 1979, Wheeler voiced the Teamsters' objections to the deregulation of the trucking industry—a nascent proposal in Congress. After he completed his presentation, Wheeler heeded Williams' request and left the Senator's office. Williams, Dorfman, and Senator Cannon continued to meet for another 25 to 45 minutes. The three men discussed the Wonderworld property and the homeowners' effort to purchase the land. Williams and Dorfman, seeking to influence Senator Cannon's actions and decisions on the deregulation legislation, offered the Senator and his group the exclusive right to purchase the Wonderworld property at a price of $1,400,000. Over the next four months, the defendants, Allen Dorfman, and Dorfman's associate William Webbe, worked to keep this promise.

Robert Bjornsen, on behalf of the homeowners, submitted to Palmieri a $1,400,000 bid on January 12, 1979. The bid, however, was rejected for failure to conform to Palmieri's requirement of full payment within one year. Palmieri also rejected a $1,600,000 bid from investor Allen Glick because he failed to submit the requisite personal-finance statement. Receiving no complying bids, Palmieri decided to pursue further negotiations with Bjornsen, the homeowners' agent, and Glick, the high bidder.

Palmieri and Glick appeared to reach an agreement. Glick orally made a new offer for $1,600,000 and agreed to raise the down payment from $400,000 to $800,000. On January 29, 1979, a Palmieri representative accepted this offer and closing documents were mailed to Glick's attorney. Before the purchase agreement was executed, however, Glick withdrew his offer.

A concerted effort by the four defendants led to Glick's withdrawal. Early in the afternoon on January 30, 1979, Joseph Lombardo, whose vocational status is something of a mystery, made a proposal to Allen Dorfman to send people from the Pension Fund to speak with Glick. In particular, Lombardo named as emissaries Thomas O'Malley, then a trustee of the Fund, and Andrew Massa, a former

trustee. Roy Williams approved the trip and made an airplane available to O'Malley and Massa.

Later that same day, O'Malley and Massa did fly to California to meet with Glick. During a dinner meeting, O'Malley and Massa frankly described their intentions. They told Glick that a homeowners' group headed by Senator Cannon wanted to buy the Wonderworld property. The two men further informed Glick that there was legislation pending before a Senate committee chaired by Senator Cannon that would harm the trucking industry and that they wanted the legislation defeated. To secure Senator Cannon's appreciation, therefore, O'Malley and Massa asked Glick to withdraw his $1,600,000 offer. Glick readily agreed to withdraw the outstanding offer, but made it known that his partner, Fred Glusman, might wish to continue his own efforts to purchase the property.

The next day Glick withdrew the offer on the Wonderworld property and suggested to Glusman that he refrain from individually pursuing the land. From the conspirators' point of view, therefore, prospects appeared promising on February 9, 1979, when Bjornsen submitted another offer on behalf of the homeowners. The purchase offer was again for $1,400,000 and included a sizeable commission to be paid to Bjornsen's company. Undeterred by Glick's suggestion, however, Glusman made an offer for $1,600,000. Accordingly, the homeowners' offer was rejected and Palmieri proceeded to close the deal with Glusman.

Before the deal was completed, Glusman was again contacted by Glick who told Glusman not to "fight city hall." Evidently not prepared for such a contest, Glusman withdrew his offer on February 15, 1979. Thus by the beginning of March, the slate was clean and Palmieri resumed negotiations with Bjornsen.

By that time, however, it seemed plain that the Wonderworld property would be "down-zoned"; consequently, the homeowners' group lost interest in buying the property and disbanded. Dorfman and Webbe, determined to keep a promise made to Senator Cannon, then

helped Bjornsen find a new partner for the desired purchase—Robert L. Smith, who was a Las Vegas contractor and business associate of Dorfman. Bjornsen submitted a series of three bids on behalf of "Robert L. Smith"; each was for $1,400,000 and each was rejected by Palmieri for providing an insufficient down payment. Throughout this final stage of the conspiracy, Dorfman and Williams lamented their inability to fulfill the commitment made to Senator Cannon. Yet as late as May 21, 1979, Dorfman assured the Senator that the deal was still "wide open."

On May 25, 1979, Palmieri accepted American National Development Corporation's offer to purchase the Wonderworld property for $1,600,000. On July 2, 1979, the property was sold to that corporation.

On May 22, 1981, the defendants were charged in all counts of an 11-count indictment. Count I charged the defendants with a conspiracy to bribe a United States Senator, 18 U.S.C. § 371. Count II charged the defendants with causing O'Malley and Massa to travel in interstate commerce to California, with the intent to promote the bribery, 18 U.S.C. § 1952. Counts III to XI charged the defendants with the use of interstate wires for the purpose of executing a scheme to defraud the Pension Fund of its "right to the conscientious, loyal, faithful, disinterested, and unbiased services of Thomas F. O'Malley," 18 U.S.C. § 1343.

The district court denied the defendants' motions to dismiss the indictment, *see United States v. Dorfman*, 532 F. Supp. 1118 (1981), and to suppress evidence obtained through electronic surveillance, *see United States v. Dorfman*, 542 F. Supp. 345 (1982). A jury trial was held and the defendants were found guilty as charged in all counts of the indictment. Williams received the maximum sentence of 55 years in prison, but this sentence was imposed pursuant to 18 U.S.C. § 4205(c) to permit a study of Williams' health. The district court indicated that when the study is complete, Williams' sentence will be reduced.

Lombardo was sentenced to a prison term of 15 years, O'Malley to a term of 30 months, and Massa to one year.

II.

The government's evidence at trial consisted in large measure of conversations surreptitiously intercepted and recorded pursuant to court orders and the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 to 2520 ("Title III"). The defendants, blending constitutional and statutory arguments, maintain that this evidence was illegally obtained and introduced at trial. Before we address these arguments, however, we briefly describe the government's electronic investigation.

A.

On January 29, 1979, the government, through a special attorney for the Department of Justice, applied for Title III authority to place a wiretap on telephones at the Amalgamated Insurance Agency, which was Dorfman's place of business. The application stated that there was probable cause to believe that Dorfman and others were illegally "conspiring to establish, promote, manage, and/or receive compensation from hidden interests in one or more Reno and Las Vegas, Nevada, gambling casinos." 542 F. Supp. at 370. The application, which was made to the Chief Judge of the United States District Court for the Northern District of Illinois, was supported by an affidavit of FBI Special Agent Peter Wacks. Wacks' affidavit, in turn, was based on reports from six confidential informants and one James Fratianno. The Chief Judge granted the application and the surveillance commenced.

The initial surveillance order expired after 30 days; thus on March 1, 1979, the government applied to the district court for authority to continue intercepting telephone calls. This application repeated the initial allegations concerning hidden interests in casinos. The application, however,

added the Aladdin hotel-casino to the list. This new allegation was made in an affidavit of Special Agent Wacks and supported by transcripts of conversations intercepted pursuant to the initial court order. The Chief Judge granted the March 1, 1979, application and authorized 30 more days of wiretaps.

A series of 30-day authorizations followed throughout 1979 and into 1980. Not until the application of April 28, 1979, did the government allege that Dorfman and others were involved in a conspiracy to bribe Senator Cannon. We disclose this brief history by noting that on April 7, 1979, the government obtained its most effective Title III authority—a court order that permitted the placement of electronic-listening devices in the offices of Dorfman and William Webbe.

The defendants have brought up from the district court's suppression proceedings essentially two arguments. First, they assert that the government's March 1, 1979, application did not satisfy Title III's requirements and, in any event, was supported by an affidavit containing a deliberate or reckless misrepresentation. Second, they contend that the Fourth Amendment required the suppression of conversations recorded prior to April 28, 1979, when the government first alleged the existence of a conspiracy to bribe Senator Cannon. We now consider, and ultimately reject, these positions.

B.

The government supported its March 1, 1979, Title III application with the same allegations and probable-cause showing made to obtain the original surveillance order. An extension application is not complete, however, if it only duplicates the original submission. The authorizing judge must be sufficiently informed about the results of the prior interceptions to answer intelligently the question whether probable cause exists to believe relevant conversations will be intercepted in the future. Accordingly,

18 U.S.C. § 2518(1)(f) requires that the extension application contain a statement of results previously obtained, or an explanation of the failure to obtain results. Ruling on the defendants' motion to suppress, the district court held that the government's application of March 1, 1979, "did not contain the required explanation." 542 F. Supp. at 374.

The government asserts that the district court overlooked a statement in the March 1, 1979, application that "[d]uring the entire period of this court's order for the interception of wire communications, the main subject of the investigation, Allen Dorfman, was out of the State of Illinois." In the government's view, this declaration is a "reasonable statement of the failure to obtain . . . results," 18 U.S.C. § 2518(1)(f).

There is good reason to doubt that the brief reference to Dorfman's absence was sufficient to satisfy 18 U.S.C. § 2518(1)(f). For instance, the statement was made in the context of (incorrectly) asserting that conversations relating to the January 29, 1979, allegations had been intercepted. We would thus hesitate to hold that the government's application fairly explained the results of prior surveillance to allow an intelligent probable-cause determination. We need not so hold, however, because the March 1 application was not founded solely on a renewal of the initial (January 29) allegations.

As we noted above, allegations concerning the Aladdin hotel-casino were made first in the March 1 application. Special Agent Wacks alleged in his affidavit that the FBI had intercepted conversations pursuant to the January 29 wiretap order that "concerned the promotion and management of hidden and unlawful interests in the Aladdin hotel-casino." Wacks provided the court with transcripts of the conversations, biographical information on the participants, and the meaning of certain veiled references.

Wacks' allegations and the transcripts of conversations formed an ample basis for the Chief Judge's probable-

cause finding under § 2518(3).[4] The one-month-old allegations concerning other casinos were surplus, and any failure to explain the lack of intercepted calls to substantiate the January 29 allegations was rendered immaterial. Apart from the purportedly inadequate § 2518(1)(f) explanation, the defendants cite, and we have discovered, no other statutory deficiency in the government's March 1 submissions. All predicates for a Title III order were thus satisfied and the Chief Judge properly issued the wiretap authorization.

The Supreme Court's decision in *United States v. Giordano*, 416 U.S. 505 (1974), which is cited by the defendants, does not compel a contrary conclusion. The Court in that case suppressed evidence intercepted under a Title III extension order because the extension was dependent on evidence illegally obtained pursuant to an initial order. The instant case, by contrast, involves only valid orders issued on applications meeting Title III's requirements. There is no basis for invoking the suppression remedy to punish the government for a deficient (if it was) § 2518(1)(f) statement, which was inessential to the showing of probable cause and the issuance of the March 1 wiretap order.

Special Agent Wacks' allegation in his March 1 affidavit that conversations were intercepted concerning the "promotion and management of hidden and unlawful financial interests in the Aladdin hotel-casino" proved to be false. The conversations allegedly involving the Aladdin hotel-casino turned out to involve the defendants' and Allen Dorfman's efforts to direct the Wonderworld property to the homeowners' group headed by Senator Cannon. The defendants use this misrepresentation as their primary weapon in the attack on evidence intercepted pursuant to the March 1 wiretap order.

---

[4] In a footnote the defendants assert that the March 1 materials did not establish probable cause. For the reasons expressed by the district court, *see* 542 F. Supp. at 375-76, we disagree. *See also infra* pp. 12-13.

In challenging Wacks' affidavit in the district court, the defendants' task was defined by *Franks v. Delaware*, 438 U.S. 154, 171 (1978): they had to prove that the Aladdin allegations were intentional lies or made with reckless disregard for the truth.[5] *See also United States v. Gaertner*, 705 F.2d 210, 212 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 979 (1984). We know what intentional lies are, but the meaning of "reckless disregard for the truth" is not self-evident, and the Court in *Franks* did not define the concept. We do know, however, that recklessness is not negligence, *see Franks*, 438 U.S. at 171, and that the Court has clarified the notion of reckless disregard in the context of First Amendment cases involving libel. We thus agree with the District of Columbia Circuit, *see United States v. Davis*, 617 F.2d 677, 694 (1979), that the First Amendment definition should be applied by analogy in the *Franks* setting. Accordingly, to prove reckless disregard for the truth, the defendants had to prove that the affiant "in fact entertained serious doubts as to the truth of his" allegations. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Because states of mind must be proved circumstantially, a factfinder may infer reckless disregard from circumstances evincing "obvious reasons to doubt the veracity" of the allegations. *See id.* at 732.

The district court held an extensive evidentiary hearing, applied the correct legal standards, and found that the defendants "failed to demonstrate that the incorrect March 1 Aladdin allegations were either intentional misrepresentations, or made with reckless disregard for the truth." *United States v. Dorfman*, 542 F. Supp. at 381. We may disturb this finding only if, after a review of the record, we find it clearly erroneous. *See United States v. Wuagneux*, 683 F.2d 1343, 1355 (11th Cir. 1982), *cert. denied*, 104 S. Ct. 69 (1983); *United States v. Lefkowitz*, 618 F.2d 1313, 1317 (9th Cir.), *cert. denied*, 449 U.S. 824

[5] A challenged statement must also be material in the sense that without it, no probable cause was established. The Aladdin allegations fit this definition of materiality.

(1980); *United States v. Cruz*, 594 F.2d 268, 272 (1st Cir.), *cert. denied*, 444 U.S. 898 (1979).

A review of conversations intercepted pursuant to the January 29 wiretap order demonstrates that the government's Aladdin allegations were not manufactured from whole cloth. On January 31 and February 1, the government intercepted communications between one "Sandy" and David Dorfman, Allen Dorfman's son and associate. On January 31, the two discussed an attempt being made by Colonial Commercial Credit Corporation to refinance the Aladdin hotel-casino. They expressed concern about a competing refinancing proposal and a mysterious "source" of funds. The conversation intercepted on February 1 indicates that Sandy talked about the Aladdin with Allen Dorfman, who stated that the "deal" was "dead," but who still planned a future meeting regarding the matter.

Beginning on January 30, and continuing throughout February, the government also intercepted calls concerning a "bid" on a piece of property. Allen Dorfman, Joseph Lombardo, William Webbe, and another person were overheard on January 30 talking about sending Thomas O'Malley and Andrew Massa to speak with an unnamed person about a "bid" that they wanted "handled." In a series of calls that followed, the government learned more about the handling of this bid: a man named Glick was the bidder on the property and Allen Dorfman succeeded in securing Glick's withdrawal. The government further learned on February 13 that a bid had been rejected by "Palmieri."

The conversations by themselves could have led a reasonable person to conclude that Allen Dorfman and his associates were involved in an effort to acquire, promote, or manage a hidden interest in the Aladdin hotel-casino. And Special Agent Wacks' investigation revealed further facts to support such a thesis. He learned that the "Glick" in the conversations was Allen Glick, the president of Argent Corporation, which owned several Las Vegas

hotel-casinos. Wacks also learned that "Palmieri" was a firm that managed the Pension Fund's real estate assets, that the Pension Fund made loans to and had an interest in the Aladdin, and that O'Malley and Massa were Pension Fund officials. In light of the confluence of factors pointing to the Aladdin hotel-casino, and deferring to the district court's opportunity to observe the testimony of Special Agent Wacks and other investigators, we cannot term clearly erroneous the finding that the government's March 1 Aladdin allegations were not intentional or reckless misrepresentations.

The defendants primarily point to two items as compelling a contrary result. First, they note that Special Agent Wacks erroneously stated in his March 1 affidavit that conversations substantiating the original January 29 allegations had been intercepted. The district court, however, accorded this fact "marginal probative value," 542 F. Supp. at 381 n.37, and we will not reweigh the evidence on appeal. Second, the defendants accord great significance to the fact that by March 1, Special Agent Wacks and other investigators knew that the "bid" referred to in the conversations was not on the Aladdin but, rather, on some "golf course" property. The March 1 affidavit, however, did not state that the bid was on the Aladdin. The government gave the Chief Judge the transcripts and only alleged that the conversations "concern" a hidden interest in the Aladdin hotel-casino. This language is consonant with the investigators' view that somehow the machinations involving the "golf course" property also concerned a hidden interest in the Aladdin. Nothing in the transcripts is inconsistent with this view and, given the veiled nature of the discussions, the government could hardly be expected to have defined the connection more explicitly. Finally, two additional pieces of evidence support the finding that the investigators truly believed a link existed between all the conversations contained in the March 1 application: summaries of the "bid" conversations were coded into FBI files on both the Aladdin and "golf course" properties; and a telegram sent

from the FBI's Chicago office to the Director on February 14, 1979, stated that the "bid" calls "relate to" the Aladdin.

The defendants argue, nevertheless, that the government was constitutionally obliged to make a "complete and total disclosure" to the Chief Judge. Accordingly, they conclude, the government's failure to inform the Chief Judge that the "bid" in the conversations was not directly on the Aladdin mandates suppression.

We acknowledge that the rationale of *Franks* applies to omissions and that several courts have permitted litigants to challenge affidavits on the ground that facts were omitted.[6] *See, e.g., United States v. Lefkowitz*, 618 F.2d 1313, 1317 (9th Cir.), *cert. denied*, 449 U.S. 824 (1980); *United States v. Vazquez*, 605 F.2d 1269, 1282 (2d Cir.), *cert. denied*, 444 U.S. 981 (1979); *United States v. House*, 604 F.2d 1135, 1141 (8th Cir. 1979), *cert. denied*, 445 U.S. 931 (1980); *United States v. Lace*, 502 F. Supp. 1021, 1046 (D. Vt. 1980). These courts recognize, however, that the omitted fact must be material—that is, if the fact were included, the affidavit would not support a finding of probable cause. *See Lefkowitz*, 618 F.2d at 1317; *Vazquez*, 605 F.2d at 1282; *House*, 604 F.2d at 1141. It is further plain that if the challenger is permitted to marshal all exculpatory facts, fairness dictates that the government be allowed to support the affidavit with additional inculpatory information known to the affiant at the time the affidavit was made. *Cf.* 2 W. LaFave, *Search and Seizure* § 4.4, at 20 (Supp. 1983).

Judging the omission in this case by these standards, we hold that the omission did not reach the level of constitutional materiality. The transcripts included in the March 1 affidavit reveal that the "bid" was for $1,600,000. A reasonable judge would recognize that this figure is too

[6] Such a *Franks* challenge is predicated, of course, on proof that the omission was made intentionally or with reckless disregard. *See United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980).

low to be a direct offer to purchase the Aladdin hotel-casino; thus the bid and the Aladdin must, at best, be indirectly connected. Consequently, the omitted fact—that the bid was not on the Aladdin—was of marginal value and constitutionally insignificant when measured against the substantial evidence linking the bid conversations and the Aladdin, *see supra* pp. 12-13.

C.

The defendants mount a broader and more creative challenge to the admissibility of 33 conversations intercepted prior to April 28, 1979, when the government first alleged in a Title III application a conspiracy to bribe Senator Cannon. The challenge is founded on the Fourth Amendment's requirement that a search warrant "particularly describ[e] the place to be searched, and the . . . things to be seized." Before we address the heart of this argument, however, we must describe what the defendants are not challenging.

The defendants do not find unconstitutionally vague either the government's Title III applications or the Chief Judge's orders. Indeed, Congress requires in Title III that every application contain information detailing the offense under investigation, the nature and location of the property where the interception is to occur, the type of conversation sought to be intercepted, and the persons thought to be committing the alleged offense. *See* 18 U.S.C. § 2518(1)(b)(i)-(iv). In addition, any order authorizing interception must contain "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates." *Id.* § 2518(4)(c).

Similarly, the defendants do not assert that the government violated constitutional or statutory law in overhearing and recording the 33 challenged conversations. Section 2518(5), which finds its roots in the Fourth Amendment, mandates that "[e]very order and extension

thereof . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." Government agents, however, "can hardly be expected to know [which] calls are not pertinent prior to their termination." *Scott v. United States*, 436 U.S. 128, 140 (1978). When the investigation is of a suspected large-scale conspiracy, and when the suspects speak in veiled terms, the government is justified in intercepting conversations that eventually prove to be without the scope of the Title III authorization. *See id.* at 140-41; *United States v. Quintana*, 508 F.2d 867, 874 (7th Cir. 1975); *United States v. James*, 494 F.2d 1007, 1019 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974).

The defendants do make a distinction between intercepting conversations and using conversations as evidence in a criminal prosecution. Noting that the government was authorized to search for evidence of hidden interests in casinos, but intercepted 33 conversations relating to different charges, they argue that "conversations that have been 'seized' out of necessity in recorded form . . . must be embargoed and thereafter made unavailable to the investigating government agents." The constitutional infirmity arose, in the defendants' view, not when the conversations were recorded, but when the government made investigative and evidentiary use of the conversations.

The defendants must, to succeed in this argument, surmount the obstacle of the "plain view" doctrine, which authorizes the seizure of evidence not described in a warrant. To this end, the defendants note that an item in plain view may be seized only if there is probable cause to believe that the item is evidence of criminality, *see Texas v. Brown*, 103 S. Ct. 1535 (1983). Their argument concludes with a review of the 33 conversations, which the defendants describe as facially innocuous.

The defendants' rigid application of traditional search-and-seizure principles is ironic; surely it is inconsistent to demand a flexible interpretation of the Fourth Amend-

ment to afford some constitutional limits on the interception of conversations, and then to insist on a rigid reading when the needs of effective law enforcement are considered. Irony aside, we believe that it is evident that the defendants would have us apply a "plain view" principle—i.e., only items apparently evidence of a crime may be seized—in a manner never intended by the Supreme Court. The principle defines permissible seizures, not permissible uses of items lawfully seized. But as noted above, the defendants do not challenge the initial recording (search and seizure) of the 33 conversations, only the government's use of the evidence. Moreover, there is good reason to doubt that the plain view doctrine, as currently developed, should be applied to electronic interceptions of conversations. The plain view doctrine is concerned about the Fourth "Amendment's limitations upon seizures of personal property," whereas the interceptions in this case might be thought of as more like an "officer's observation of an item left in plain view, [which] involves no Fourth Amendment search." *Texas v. Brown*, 103 S. Ct. at 1541 n.4.

Were we to apply traditional search-and-seizure principles in this case, we could note that an officer performing a lawful search may, on "reasonable suspicion," conduct closer examination of an item in plain view, *see United States v. Wright*, 667 F.2d 793, 797-98 (9th Cir. 1982); if by the end of the search there is probable cause to believe that the item is evidence of a crime, it may be seized. *See United States v. Schire*, 586 F.2d 15, 19 (7th Cir. 1978). We could also note that the 33 challenged conversations are "suspicious" and that the government's Title III search continued long after the criminal character of the conversations was known. Accordingly, we could hold that the conversations were properly seized and used by the government. This reasoning, however, is just as artificial and inappropriate as the defendants' analysis. A more sensitive, less doctrinaire, inquiry is required.

The basis of modern Fourth Amendment law is the Supreme Court's understanding of "the right to privacy."

See Oliver v. United States, 52 U.S.L.W. 4425, 4427 (U.S. April 17, 1984). The defendants suggest that the maintenance of a "library . . . of recordings of conversations" is a practice of constitutional concern apart from the initial interception (overhearing) of the communications. Stripped to its core, therefore, the defendants' argument is that the Fourth Amendment prevents the government from reviewing lawfully recorded conversations for evidence of a charge not alleged in the Title III application.

We find little merit in this argument. It is settled that "once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost." *Illinois v. Andreas*, 103 S. Ct. 3319, 3324 (1983). Moreover, it has long been clear that "[p]rotecting the risk of misdescription hardly enhances any legitimate privacy interest," *United States v. Jacobsen*, 104 S. Ct. 1652, 1659 (1984); thus a government agent may constitutionally record conversations lawfully overheard. *See Lopez v. United States*, 373 U.S. 427 (1963). The nature of the privacy interest assertedly harmed by the government's review of conversations lawfully recorded, therefore, is difficult or impossible to define.

We need not rule that, in all cases, the government may review its "library of conversations" to corroborate charges not made before the Title III authorizing court. But in a case of a continuing investigation such as this, in which the government's review of the conversations promptly ripened into formal allegations justifying further Title III orders, we cannot conclude that the government's conduct was unreasonable and consequently unconstitutional.

Finally, we note that Title III itself has a mechanism to limit and assure the reasonableness of the government's use of other-crimes evidence. Section 2517(5) provides that before evidence can be used in the prosecution of an offense different from the one named in the original application, a separate application must be made to the court. *See generallly United States v. Brodson*, 528 F.2d 214,

215 (7th Cir. 1975). The application must be "made as soon as practicable," § 2517(5), and judicial approval requires "a showing that the original order was lawfully obtained, that it was sought in good faith and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order." S. Rep. No. 1097, 90th Cong., 2d Sess. 66, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2189; *see United States v. Vento*, 533 F.2d 838, 855 (3d Cir. 1976). The defendants do not raise a § 2517(5) argument on appeal.

III.

The defendants raise a variety of evidentiary arguments. They assert that the district court erred in admitting as substantive evidence portions of William Webbe's grand-jury testimony and in finding that statements made at a meeting in Dorfman's office on May 21, 1979, were in furtherance of the conspiracy to bribe Senator Cannon.

A.

As we stated in Part I of this opinion, Allen Dorfman's associate and employee William Webbe played a central role in the conspiracy to bribe Senator Cannon. Webbe escaped prosecution, however, because he was granted immunity and compelled to testify before the grand jury and at trial. A synopsis of some of that testimony is needed to understand the defendants' first evidentiary argument.

During the first day of his grand-jury testimony, it became clear that Webbe was a recalcitrant witness unwilling to confirm information that the government learned from its electronic investigation. The prosecutor, nevertheless, focused on the January 10, 1979, meeting in Las Vegas between Senator Cannon, Allen Dorfman, and Roy Williams. Webbe, who waited outside the Senator's office during the meeting, was asked what occurred when the three men emerged from the office. Webbe testified before

the grand jury: "I got introduced to the Senator . . . and that was it."

On the second day before the grand jury, Webbe was confronted with a recording of a conversation he had with Allen Dorfman and Don Peters on May 21, 1979. The conversation, which occurred in Dorfman's office, concerned the January 10 meeting with Senator Cannon in Las Vegas. The conversers were overheard saying:

DORFMAN: Well, the only bad part about the whole thing see if we had said to him, well let's look into it, you know, because now it's really not under the custody and control of the fund anymore, and so on and so forth. But Roy Williams just unequivocally came right out and says, you got the property Senator, don't worry about it. It's our property, you own it. You got a commitment from him.

WEBBE: You take care of your end.

DORFMAN: And I turned to Roy, cause he verified it the other day, I said Roy, we made a firm commitment to this guy. This wasn't an if-come deal. I said if it's gonna be an if-come deal, you tell a guy it's an if-come deal, and he can conduct himself accordingly. I said, but we made a firm commitment. And even when we were walking out of his office, and after he said you know that, uh, I, uh, . . . gee . . . I hope I have a series of different items that he wanted, you know, to help him on the, on the deregulation. And then so on . . . no, you were standing there.

WEBBE: I was there.

DORFMAN: And, uh, you'll have everything, and he says and you fellows will take care of

that property thing? Don't worry about it's all taken care of.

WEBBE: Roy said you take care of your end and we'll take care of our end for you.

DORFMAN: That's right.

Confronted with this conversation and again asked what occurred when the January 10 meeting ended, Webbe testified before the grand jury: "I think they said, 'Bring up some points,' or something like that, 'or some ideas that you have,' . . ."

On Webbe's fourth and last day before the grand jury, he was again confronted with the May 21 recording. The prosecutor then elicited the following testimony:

> Q. Now, we have been over this a few times, Mr. Webbe, but just so I have it clear, isn't it fair to say that a summary of this conversation, so we all know what you talked about, was that upon exiting, Cannon indicated to Dorfman, "You fellows will take care of that property thing," and Allen replied, "Don't worry about it. It is all taken care of.
>
> A. That's correct, sir.
>
> Q. That is when Roy said, "You take care of your end, and we'll take care of ours," correct?
>
> A. That's correct.
>
> Q. Then the Senator went on and said about the deregulation, "You give me some of your input, and we can come around and work this thing out together."
>
> A. Yes.
>
> Q. And you are indicating, I believe, by "working this thing out together," that at that point in time it was your understanding that Senator Cannon was referring to deregulation.
>
> A. Yes, sir, I think it was stated in that tape that they were talking about that.

This last quoted grand-jury testimony was introduced as substantive evidence at trial. It was admitted after Webbe testified at trial that, to the best of his memory, the only thing said when Williams and Dorfman left Senator Cannon's office on January 10 was the Senator's request for the others "to get back with some input on the deregulation." The defendants argue that Webbe's grand-jury and trial testimonies are consistent and thus the district court erred in admitting, pursuant to Federal Rule of Evidence 801(d)(1)(A), the grand-jury testimony as substantive evidence.

The principle of law embodied in Rule 801(d)(1)(A) appears clear on its face—a trial witness's grand-jury testimony is not hearsay (and admissible substantively) if it is inconsistent with his trial testimony. As long as people speak in nonmathematical languages such as English, however, it will be difficult to determine precisely whether two statements are inconsistent. But we do not read the word "inconsistent" in Rule 801(d)(1)(a) to include only statements diametrically opposed or logically incompatible. Inconsistency "may be found in evasive answers, . . . silence, or changes in positions." *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980). In addition, a purported change in memory can produce "inconsistent" answers. *See United States v. Distler*, 671 F.2d 954, 958 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981). Particularly in a case of manifest reluctance to testify, *see United States v. Thompson*, 708 F.2d 1294, 1302 (8th Cir. 1983), "if a witness has testified to [certain] facts before a grand jury and forgets . . . them at trial, his grand jury testimony . . . falls squarely within Rule 801(d)(1)(A)." *United States v. Marchand*, 564 F.2d 983, 999 (2d Cir. 1977),*cert. denied*, 434 U.S. 1015 (1978). In view of the multitude of factors, a district court's ruling under Rule 801(d)(1)(A) will be disturbed only if an abuse of discretion. *See United States v. Distler*, 671 F.2d 954, 958 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981).

We hold that the district court did not err, and did not abuse its discretion, in finding Webbe's trial and grand-

jury testimonies inconsistent. At trial Webbe's memory of the January 10 conversation outside Senator Cannon's office was limited, vague, and not inculpatory. A fair reading of the admitted grand-jury testimony, by contrast, indicates that Webbe recalled Senator Cannon saying, "You fellows will take care of that property thing," and Dorfman replying, "Don't worry about it. It is all taken care of." The defendants attempt a reconciliation by asserting that Webbe's brief answers before the grand jury were not statements about what was said on January 10 but, rather, affirmations that the May 21 recording indicates that Senator Cannon and Dorfman made such remarks. Two items persuade us that the defendants are mistaken. First, the prosecutor's questions before the grand jury contain phrases such as "That is when Roy *said*," and "Then the Senator went on and *said*."[7] The prosecutor was not asking about what was heard on the May 21 tape, but what was "said" outside Senator Cannon's office. Second, Webbe's grand-jury testimony immediately prior to that introduced at trial confirms that Webbe was recalling the events of January 10, not the words on the May 21 recording:

> Q. Mr. Webbe, on this tape you heard your voice acknowledge, did you not, the fact that Senator Cannon said, "And you fellows will take care of that property thing," and Alan [sic] saying, "Don't worry about it. It's all taken care of."
>
> Did you hear that?
>
> A. Yes, sir, I heard that.
>
> Q. And that was also part of the conversation that occurred on January 10th as these three individuals exited Senator Cannon's office, isn't that true?
>
> A. I believe it was.

---

[7] Answers are within Rule 801(d)(1)(A) even if elicited by means of leading questions. *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980); *United States v. Champion International Corp.*, 557 F.2d 1270, 1274 (9th Cir.), *cert. denied*, 434 U.S. 938 (1977).

> Q. There's no doubt that as of that part of the conversation that Senator Cannon was referring to a piece of property which you came to learn was the Wonder World property, isn't that true?
>
> A. That's correct, sir.

At times before the grand jury Webbe did, in fact, only acknowledge what he heard on the May 21 recording. The defendants have no basis, however, to assert that the grand-jury testimony read at trial was unrepresentative or taken out of context. Defense counsel declined the district court's invitation, *see* Fed. R. Evid. 106, to designate a larger portion of the grand-jury testimony to be read by the prosecutor. We know of no independent duty of an examiner of a reluctant witness, *see supra* pp. 19-22, to introduce prior consistent testimony along with inconsistent testimony. Moreover, defense counsel were free to question Webbe about the meaning of his answers before the grand jury and, in the process, to introduce prior consistent testimony, *see* Fed. R. Evid. 801(d)(1)(b).

Noting that Webbe's initial grand-jury testimony was consistent with his trial testimony, and asserting that the district court's ruling was incompatible with the rationale of Rule 801(d)(1)(A), the defendants quote the following remark from the Notes of the Advisory Committee:

> "In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it is made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation." (quoting California Evidence Code § 1235).

However, the defendants fail to quote a comment, in the same paragraph, that the Rule " 'will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.' " In light of the fact that Webbe spoke with defense counsel seven or eight times after testifying before the grand jury but never with the government, which would not agree to

Webbe's conditions for a meeting, we have little doubt that the latter rationale fully applied in this case.

Finally, we find no fault with the manner of the district court's ruling. After Dorfman's counsel stood to express his opinion that Webbe's grand-jury testimony concerned the contents of the May 21 recording, the court responded: "I do not agree with that, sir, with all due respect to you. It is with regard to what occurred on January 10th." This response was invited by trial counsel who did not, either at the time or after the jury was excused, state an objection to the court's comment. We will not now isolate one comment from the lengthy trial to find a prejudicial error where none was recognized below.[8]

B.

The May 21 recording, which prompted Webbe's grand-jury testimony, was itself admitted in evidence against the defendants as statements of co-conspirators, *see* Fed. R. Evid. 801(d)(2)(E). In this recording, Dorfman and Webbe are overheard informing Don Peters about an unfulfilled "commitment" to sell Senator Cannon a piece of Pension Fund property for $1,400,000. Dorfman expresses his frustration with Roy Williams, who also made the commitment, and the Pension Fund trustees who would not adequately pressure Palmieri. *See also supra* pp. 20-21.

After reviewing this recording, the district court found that "Mr. Dorfman is trying to get Peters to intervene to get something done." If this finding is justified, Dorfman's and Webbe's expressions were admissible as statements "in furtherance of the conspiracy," Fed. R. Evid. 801(d)(2)(E); *see United States v. Bentley*, 706 F.2d 1498, 1506 (8th Cir.), *cert. denied*, 104 S. Ct. 107 (1983), and were not simply idle chatter, *see, e.g., United States v.*

[8] We also find no error in the district court's admission under Rule 801(d)(1)(A) of Webbe's grand-jury testimony concerning the length of the January 10 meeting.

Moore, 522 F.2d 1068, 1077 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976). The defendants ask us to examine the district court's finding and we will, but our review is governed by the clearly-erroneous standard. *See United States v. Aguirre*, 716 F.2d 293, 298 (5th Cir. 1983); *United States v. Arruda*, 715 F.2d 671, 684 (1st Cir. 1983); *United States v. Romano*, 684 F.2d 1057, 1066 (2d Cir.), *cert. denied*, 103 S. Ct. 376 (1982).

We cannot term clearly erroneous the finding that Dorfman impliedly sought Don Peters' assistance. From what we know about Peters, described as a former Pension Fund trustee and one of the most important Teamsters in the Chicago area, he could have succeeded where Williams and the trustees had failed. Moreover, the May 21 conversation reveals that Peters was not ignorant of Senator Cannon's role in deregulation or Dorfman's associations with the Senator. Near the beginning of the recording, Peters, referring to Senator Cannon, states, "He took care of deregulation, didn't he?" Later in the conversation Peters and Dorfman talk about asking the Senator for "another favor." And, when Dorfman and Webbe cannot recall when the commitment to Senator Cannon was made, Peters reminds them that it was in "January, because _____ and I were there." In addition, the context of the May 21 discussion supports the district court's finding. Immediately after talking with Senator Cannon on the telephone and telling him that the Wonderworld deal was still alive, Dorfman began informing Peters of the "commitment." Subsequently, in the midst of bringing Peters up to date, Dorfman called Bjornsen, the Senator's son-in-law, and discussed a renewed offer to be made to Palmieri. Indeed, Dorfman's implied request for assistance did produce a suggestion from Peters that a group of Las Vegas Teamsters buy Wonderworld from the Pension Fund. This suggestion evoked laughter from Dorfman but not, as far as we can perceive from listening to the tape, because it was a joke. Rather Dorfman considered the idea too creative or complex for the Teamsters. "Don, the only problem Don is that that's what you and I could do."

Our conclusion that the May 21 conversation was admissible as co-conspirators' statements, coupled with no further Rule 801(d)(2)(E) challenge, disposes of the defendants' claim under the confrontation clause of the Sixth Amendment. *See United States v. Xheka*, 704 F.2d 974, 987 n.7 (7th Cir.), *cert. denied*, 104 S. Ct. 486 (1983); *United States v. Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 1982); *United States v. Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); *United States v. Isaacs*, 493 F.2d 1124, 1161 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). It should be plain to litigants that absent very persuasive reasons to overrule these cases, or a command from a higher authority, challenges to co-conspirators' statements should be based on the requirements of Rule 801(d)(2)(E), not on the Sixth Amendment.

C.

The final evidentiary question concerns only Roy Williams. The district court ruled that the results of Williams' two ex parte polygraph tests were inadmissible and, in the process, denied Williams leave to present foundation evidence about the examinations. The district court's decision was based on two grounds. First, the court stated that "assuming, arguendo, validity to the theory of automatic response to stress occasioned by deception, the authorities in the area recognize as most unreliable ex parte, secret polygraph examinations, the likes of which Mr. Williams underwent here." Second, the court, noting that the test results could be admitted only to bolster Williams' credibility, declared, "[I]t is my judgment that it is far better that that credibility be resolved by the jury than by a polygraph examiner."

Before addressing Williams' contention that the district court erred, and responding to his plea for fundamental fairness, we question whether the admission of the polygraph results would have positively influenced the jury's view of Williams' credibility. At trial Williams testified that as the meeting in Senator Cannon's office on January 10, 1979, was ending, the Senator said, "Thanks

Allen. I believe that I will make a bid on that property." According to Williams, Dorfman then remarked, "We'll do everything that we can to see that you get a fair shot at purchasing the property." Williams further testified that he shortly thereafter learned that the property discussed in the Senator's office was the Wonderworld land. At his initial polygraph examination, however, Williams was asked: "At that meeting on January 10, 1979, did anyone in your presence discuss the Wonderworld property?" He answered, "No." This answer plainly does not square with Williams' trial testimony and thus, we surmise, he should be pleased that the test results were excluded. Nevertheless, we must consider Williams' legal challenge to the district court's ruling.

It is clear that the decision to exclude polygraph evidence is "within the sound discretion of the trial judge." *United States v. Rumell*, 642 F.2d 213, 215 (7th Cir. 1981). What we mean by the term "discretion" is less clear. To say that a decision is committed to the district court's discretion could mean that the trial judge's ruling is unreviewable on appeal. *See* R. Dworkin, *Taking Rights Seriously* 31-32 (1977). We have not, *see, e.g., United States v. Feldman*, 711 F.2d 758, 767 (7th Cir.), *cert. denied*, 104 S. Ct. 352 (1983), and will not go that far in the context of a ruling on polygraph evidence. We will observe, however, that not all discretionary matters are of the same ilk. Certain judgments, such as the length of a criminal sentence, *see United States v. Torres*, No. 83-1083, slip op. at 23 (7th Cir. May 1, 1984), command more deference than other discretionary decisions, *see, e.g., Coyne—Delany Co. v. Capital Development Board of Illinois*, 717 F.2d 385, 392 (7th Cir. 1983) (damages on an injunction bond).

A district court's decision concerning polygraph results deserves considerable deference. *See United States v. Black*, 684 F.2d 481, 483 (7th Cir.), *cert. denied*, 103 S. Ct. 463 (1982). Indeed, Williams cites no case from this circuit, or any other circuit, that reverses a district court's decision refusing to admit such evidence. Because this evi-

dentiary question turns on a complex and imprecise balancing of factors, *see United States v. Bursten*, 560 F.2d 779, 785 (7th Cir. 1977) (factors include accuracy, relevance, and prejudice), an appellant's burden is heavy to convince us that a reversible error occurred.

Viewed in this light, we hold that the district court did not abuse its discretion in excluding the results of Williams' two ex parte polygraph examinations. The district court's distrust of ex parte tests was rational; we expressed the same view in *United States v. Feldman*, 711 F.2d 758, 767 (7th Cir.), *cert. denied*, 104 S. Ct. 352 (1983). There is, however, a study that suggests our distrust is unfounded, *see* Raskin, Bardland & Podlesny, *Validity And Reliability of Detection of Deception*, National Institute of Law Enforcement and Criminal Justice (June 1978). But because Williams did not present this study to the district court, he is in no position to find fault with that court's reasoning. Moreover, the district judge's preference for the jury to decide credibility questions was entirely appropriate and in accord with our prior decisions.[9] *See United States v. Rumell*, 642 F.2d 213, 215 (7th Cir. 1981).

IV.

Early one morning near the end of the trial, five jurors received telephone calls at their homes. The caller identified himself as a "representative" of "concerned citizens" and referred to the trial. Each juror promptly hung up the telephone but, in four instances the caller mentioned Allen Dorfman's name, in one case the caller urged Dorfman's conviction, and in one other call the unidentified

[9] An argument also unique to Williams is that the district court should have granted his motion for a severance on the ground that prejudicial evidence "spilled over." To the extent that evidence was not admitted against Williams, the jury was so instructed. We find no abuse of discretion. *See United States v. Moschiano*, 695 F.2d 236, 245 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 110 (1983).

"representative" mentioned the word "hoodlums." In light of these contacts, the defendants contend that the district court was required to grant a mistrial or, at least, to excuse the five contacted jurors.

Not every improper ex parte contact with jurors requires a mistrial. *See United States v. Fleming*, 594 F.2d 598, 608 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979); *see also United States v. Norton*, 700 F.2d 1072, 1076 (6th Cir.), *cert. denied*, 103 S. Ct. 1885 (1983). Our system of justice has not delegated to every reprobate the power to effect a mistrial. A trial may proceed if the court, after considering factors such as the communication's nature, the jurors' responses, and the curative ability of instructions, *see Sher v. Stoughton*, 666 F.2d 791, 795 (2d Cir. 1981), finds that the jury can (and will) remain impartial and render a verdict based solely on the evidence, not the improper contact. This finding is essentially one of fact, *see Rushen v. Spain*, 104 S. Ct. 453, 456 (1983), and is reviewable under the clearly-erroneous standard.[10] *See Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984).

Pursuant to an agreement between the parties, the district court questioned the five contacted jurors in chambers. The court asked each juror to describe the call, whether the call would affect his or her ability to be an impartial juror, and whether he or she could disregard the call and confine deliberations to the evidence, the lawyers' arguments, and the instructions. Transcripts of the questioning were provided to defense counsel who, subsequently, moved for a mistrial. In denying that motion, the district court stated:

> I observed the demeanor of all five of these people. I looked them in the eye as I questioned them. I had the advantage, or perhaps disadvantage, of having

[10] Given the secrecy of jury deliberations, a prediction of impartiality is virtually the same as a post-verdict finding to the same effect. If, however, the court finds adequate reasons to doubt its prediction, the options of a new trial or post-conviction relief are available.

> talked to them twice today on the subject, so I was interviewing them from some notes. I am confident that they are being truthful, candid and honorable with us when they say they can put these experiences out of their mind and decide the case solely on the basis of the evidence that they hear in the courtroom, the arguments of the lawyers and the instructions, and that they will not discuss the experience with their fellow jurors. I am totally confident of that.

There was ample basis for the district court's belief. The district judge observed and worked with the jury, which he labeled "truly extraordinary," for many weeks. He observed the jurors as they described the calls and their reactions. We may not, as the defendants request, disregard jurors' statements as inevitably suspect. *See Smith v. Phillips*, 455 U.S. 209, 217 n.7 (1982); *United States v. Fleming*, 594 F.2d 598, 608 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979). Moreover, we will not hold that the communications involved inherently or necessarily prejudicial remarks. Threats were not made and at most one juror heard a comment urging a guilty verdict, something properly heard from the prosecutor at trial. If more need be mentioned, we only note that throughout the lengthy trial the jurors diligently followed instructions, justifying the district court's observation, "I just think that they are going to abide my instructions."

The defendants focus special attention on juror Heller, who stated that she was unnerved by the call. What we wrote in the preceding paragraph, however, applies with equal force to juror Heller. Furthermore, the district judge remarked, "She was very composed when she was with me," and "I think what she is telling us is that she is distressed by the fact that someone would call her like that and would jeopardize her position in this case." The district court thus did not err in retaining Ms. Heller on the jury.[11]

---

[11] The district court did, on motion of the defendants, excuse one contacted juror.

In addition to assessing the impact of an improper contact, the district court has "broad discretion to remedy prejudicial influences." *United States v. Verkuilen*, 690 F.2d 648, 658 (7th Cir. 1982). These discretionary tasks include, among other things, issuing instructions and granting severances. In this case the defendants contend that the district court abused its discretion when the court, after granting the government's motion to sequester the jury, told the jury of its reasoning.

Having reviewed the district court's statements, we cannot agree with the defendants. The district judge informed the jury that five jurors had received telephone calls of a similar nature. The judge further told the jury that he was convinced that no one connected with this case had anything to do with the calls. Finally, he told the jury that the caller did not pose a threat, but was simply a "crank." We believe that the district court's forthrightness prevented doubts and rumors that can be more prejudicial than truth. And by being frank and informing the jurors that the caller was not associated with the parties, the district court acted to avoid a very alarming possibility—a juror secretly learning of the calls and forming mistaken impressions, *see Owen v. Duckworth*, 727 F.2d 643, 648 (7th Cir. 1984).

V.

From the district court's jury instructions, the defendants select one to challenge:

> [A] scheme to deprive the Central States Pension Fund and its agent Victor Palmieri Company of information material to a decision which Victor Palmieri Company was required to make as a fiduciary and exclusive management agent of the Pension Fund also comes within the meaning of a "scheme or artifice to defraud."

Lombardo's counsel objected to this instruction on the ground that "[s]ix of them [jurors] may think that . . .

Palmieri was to be deprived of one set of information, and six may think that it was another set of information." To understand the import of this objection, which is renewed in the form of an argument on appeal, we must relate some aspects of the instruction conference.

When Lombardo's counsel stated his objection, the prosecutor responded that the instruction was taken directly from *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976). Indeed in *Bush* we explicitly approved the instruction challenged in the instant case. *See* 522 F.2d at 651 n.10. On the basis of this precedent, the district court overruled the objection, but accepted an additional instruction from Lombardo that particularized the *Bush* instruction. *See infra* pp. 34-35. It is plain that Lombardo's objection found the wrong target. Counsel had no basis to challenge the district court's correct statement of wire-fraud law, *see United States v. Barta*, 635 F.2d 999, 1006 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); rather counsel was asserting that the court's instructions were insufficient to ensure a unanimous verdict. But our review of the record and the briefs discloses no objection to the court's instruction on unanimity[12] and no alternative instruction tendered by the defendants. We would thus be justified in holding that the argument being made on appeal—that the instructions were insufficient to ensure a unanimous verdict—was waived. *See* Fed. R. Crim. P. 30. In the interest of justice we will not go that far but, to the extent that the court's instructions involved discretion, our review will be tempered by the lack of a properly directed objection.

A common tool to guarantee a unanimous verdict is the indictment. An indictment charging only one offense in

[12] The district court instructed the jury: "Take the forms to the jury room and when you have reached unanimous agreement on your several verdicts, you fill in and sign the verdict form. . . . Your verdicts, whether they be guilty or not guilty, must be unanimous."

a single count guards against a conviction on a less than unanimous verdict. *See United States v. Berardi*, 675 F.2d 894, 899 (7th Cir. 1982). In the context of a proper indictment, " '[i]t is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict.' " *United States v. Murray*, 618 F.2d 892, 898 (2d Cir. 1980) (quoting *United States v. Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976)); *see also United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983). In the instant case, the indictment (Counts III to XI) did charge only one offense per count—one scheme to defraud the Pension Fund of the loyal services of O'Malley. *See United States v. Dorfman*, 532 F. Supp. at 1128. From the point of view of the charges, therefore, we cannot conclude that the court's general instruction on unanimity was deficient.

The defendants do not cite, yet appear to rely on the logic of *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), which held that the unanimous-verdict requirement connotes some agreement as to what the defendant did, not just that the defendant is guilty of a crime. *Gipson* did not require unanimous agreement about all details, only that the defendant did some act within a certain "conceptual grouping." *See id.* at 458-59. Since *Gipson*, courts have not precisely defined the phrase "conceptual grouping," but seem eager to hold that different acts are within the same grouping. *See, e.g., Lampkins v. Gagnon*, 710 F.2d 374, 377 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 729 (1984); *United States v. Sutherland*, 656 F.2d 1181, 1202 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982).

Assuming, arguendo, that *Gipson* has some validity in this circuit, several factors lead us to conclude that in the present case the jury agreed on facts within the same genus. At defense counsel's suggestion, the district court followed the challenged instruction with: "It is for you to decide whether the government has proved beyond a reasonable doubt that Mr. O'Malley failed to disclose any

facts to the Pension Fund and Victor Palmieri Company and, if so, whether the facts were material." This focused the jury's attention on O'Malley, and the indictment alleged only one material nondisclosure—the failure to tell Palmieri of O'Malley's activities in "causing the withdrawal of bids on the Wonderworld property.".

In the final analysis, "only common sense and intuition can define the specificity with which the jury must describe the defendant's conduct before it convicts." Note, *Right to Jury Unanimity on Material Fact Issues*, 91 Harv. L. Rev. 499, 502 (1977). That common sense and intuition, in turn, is informed by the circumstances of the case and the arguments of the parties. In the absence of an appropriate unanimity instruction tendered by the defendants, we will not reverse the convictions on the ground of faulty instruction.[13] *See United States v. Pavloski*, 574 F.2d 933, 936 (7th Cir. 1978).

VI.

Joseph Lombardo maintains that his convictions must be reversed for insufficient evidence. Extracting from Lombardo's brief the core of his argument, we find the assertion that the government did not sufficiently prove (1) his knowledge of the conspiracy, and (2) his intent that O'Malley would fail to disclose material facts to the Pension Fund and Palmieri.

A person is not a co-conspirator, of course, if he is unaware of the "essential nature" of the conspiracy. *United States v. Fellabaum*, 408 F.2d 220, 224 (7th Cir. 1969); *see United States v. Annoreno*, 460 F.2d 1303, 1309 (7th Cir.), *cert. denied*, 409 U.S. 852 (1972). The requisite knowledge may be established by circumstantial evidence

[13] We also reject the argument that the district court erred in instructing the jury that O'Malley "had a duty to disclose and not to conceal" facts material to the decisions of the Pension Fund and its agent, Palmieri.

or inferred from basic facts. *See United States v. Zuideveld*, 316 F.2d 873, 878 (7th Cir. 1963). Indeed, the quantum of proof that the government must produce is not great; "[p]resence has been sufficient evidence of knowing participation in a conspiracy when there were suspicious circumstances, and the existence of the conspiracy was already established." *United States v. Dalzotto*, 603 F.2d 642, 645 (7th Cir.), *cert. denied*, 444 U.S. 994 (1979); *see United States v. Holmes*, 452 F.2d 249, 255-56 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972).

We find ample evidence to support the jury's conclusion that Lombardo was not an unwitting dupe, but a knowledgeable co-conspirator. A recording of a telephone conversation on January 30, 1979, plainly establishes that Lombardo selected two men associated with the Pension Fund, O'Malley and Massa, to travel to California to convince Glick to withdraw his Wonderworld bid. The trip succeeded and Lombardo was so informed on February 2, 1979. In a telephone conversation on that date William Webbe told Lombardo that Glick was willing to withdraw and, in fact, only bid on the property after Palmieri "brought it to him." Lombardo expressed satisfaction and directed Webbe to "stay right on top of it."

Lombardo's knowledge of the purpose of O'Malley and Massa's trip—to assure that Senator Cannon's group was the sole bidder on Wonderworld—may be inferred from several facts. In the conversation of February 2, Webbe told Lombardo: "I will let you . . . know out there the minute everything is completed." If Lombardo is interested in the outcome of his efforts, a reasonable jury could infer that Lombardo knows the objective of his work. Furthermore, it is unlikely that Webbe and Dorfman would have solicited and relied on the advice of Lombardo, who termed himself "an old time general," without informing Lombardo of the conspiracy's objective. In addition, Lombardo and Dorfman were overheard on May 17, 1979, discussing how the Pension Fund's asset managers were independent from the Teamster leaders. Lombardo stated, "You got a, you got an example with

Palmieri. With the Cannon deal." Finally, having listened to the pertinent recordings and heard the alacrity of Lombardo's comments, we do not hesitate to hold that the jury justifiably found Lombardo fully informed.

That the word "deregulation" was not used in Lombardo's conversations is of no moment. A co-conspirator need not know the details, *see United States v. Alvarez*, 625 F.2d 1196, 1198 (5th Cir. 1980) (en banc), *cert. denied*, 451 U.S. 938 (1981), or every objective of the conspiracy, *see United States v. Frans*, 697 F.2d 188, 190 n.1 (7th Cir.), *cert. denied*, 104 S. Ct. 104 (1983). Knowledge of the conspiracy's essential nature, *see United States v. Fellabaum*, 408 F.2d 220, 224 (7th Cir. 1969), or the "kind of criminal conduct . . . in fact contemplated," *United States v. Gallishaw*, 428 F.2d 760, 763 n.1 (2d Cir. 1970), is sufficient. As noted above, the government adequately proved knowledge of a plan to offer a "thing of value" to Senator Cannon and, from the secretive nature of the operation (Lombardo told Webbe over the phone, "Just don't mention names"), the jury could infer that Lombardo knew the favor was intended "to influence an[ ] official act." 18 U.S.C. § 201(b)(1).[14]

From our analysis of the conspiracy evidence, it follows that the jury could properly infer Lombardo's intent that O'Malley not disclose material facts to Palmieri. The plan to bribe the Senator demanded secrecy. Had O'Malley told Palmieri of his efforts to secure the withdrawal of Glick's $1,600,000 bid, the conspiracy and fraudulent scheme would have collapsed even sooner than it eventually did.[15]

---

[14] There was sufficient evidence, in any event, to support the jury finding that Lombardo was aware of the intent of the co-conspirators to influence Senator Cannon's actions on deregulation.

[15] Lombardo also makes the "constitutional" argument that the trial was too complex for the jury to understand and counsel to render effective assistance. To accept this argument, we would have to rewrite several chapters of any constitutional-law treatise. This we decline to do.

VII.

After sentencing, the defendants filed motions for a new trial based on newly discovered evidence, *see* Fed. R. Crim. P. 33. The defendants' "newly discovered evidence" consisted of former F.B.I. agent H. Edward Tickel's affidavit, which states that prior to obtaining any Title III authorization, he participated in two surreptitious entries into the offices of Allen Dorfman's Amalgamated Insurance Agency. The defendants contend that Tickel's allegations, if true, warrant suppression of the evidence obtained through electronic surveillance. The district court, without holding an evidentiary hearing, denied the new-trial motions. We could affirm on any of several grounds, but will select the most obvious one—the defendants' lack of standing.

Standing analysis is, in essence, a bipartite inquiry: who is a proper party to urge suppression of a piece of evidence, and whose rights may a proper party assert? Because the defendants' conversations were overheard and recorded, they are proper parties to maintain that the tapes should be suppressed. *See* 18 U.S.C. §§ 2510(11), 2518(10)(a). The defendants reach an insurmountable obstacle, however, when the nature of their suppression argument is considered and the person whose rights were allegedly violated is identified.

Tickel, according to his affidavit, did not enter any of the defendants' offices; he was only in Amalgamated Insurance Agency's exterior lobbies and corridors, the alarm room, and the frame room. *United States v. Williams*, 565 F. Supp. 353, 361 (1983). The district court found, and the defendants do not challenge, that no defendant "used the areas searched in any way that created a legitimate expectation of privacy." *Id.* at 362; *see also United States v. Alewelt*, 532 F.2d 1165, 1168 (7th Cir.), *cert. denied*, 429 U.S. 840 (1976). Tickel's alleged searches did violate Allen Dorfman's rights but these searches, which the defendants contend mandate suppression of the electronic evidence, "did not infringe *their* fourth amendment rights." 565 F. Supp. at 362 (emphasis added).

Under both Fourth Amendment principles, *see United States v. Payner*, 447 U.S. 727, 731 (1980), and Title III law, *see United States v. Fury*, 554 F.2d 522, 525 (2d Cir. 1977), *cert. denied*, 436 U.S. 931 (1978), a defendant may not obtain the exclusion of evidence on the ground that someone else's rights were violated. In other words, a defendant may assert only his own rights. Consequently, a defendant may not successfully challenge the admissibility of evidence on the basis that the evidence is tainted (or "the fruit of") some past infringement of another's rights. *See United States v. Williams*, 580 F.2d 578, 583 n.21 (D.C. Cir.) (Title III case), *cert. denied*, 439 U.S. 832 (1978); *United States v. Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975) (same); *see also United States v. Chase*, 692 F.2d 69, 70 (9th Cir. 1982) (Fourth Amendment standing law); *United States v. Hansen*, 652 F.2d 1374, 1386-87 (10th Cir. 1981) (same). In this case, the defendants would not have a constitutional cause of action against Tickel for his two searches of Amalgamated Insurance Agency, and we will not, for purposes of the exclusionary rule, permit an indirect attack where no direct challenge is possible.

Furthermore, *United States v. Payner*, 447 U.S. 727 (1980), precludes the invocation of our supervisory powers. In *Payner* this Court held that a federal court may not "use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights." *Id.* at 733. We will not permit an end run around *Payner* by holding, as the defendants request, that the government's failure to inform the Title III authorizing court of Tickel's searches was a material omission, *see generally supra* p. 14, requiring suppression.

Finally, we disagree with the defendants that, assuming Tickel's allegations are true, the district court was required to reverse its earlier finding of no *Franks* violation, *see supra* pp. 10-15. The Tickel affidavit is simply not that probative of whether the government made intentional or reckless misrepresentations in the March 1,

1979, Title III application. Indeed, an overzealous government agent might be less likely to doubt the truth of criminal allegations than a detached investigator. In any event, we will not rule that the district court abused its discretion, *see United States v. Oliver*, 683 F.2d 224, 228 (7th Cir. 1982), in refusing to reverse its earlier *Franks* ruling.

VIII.

For the reasons expressed in this opinion, the judgments of conviction and the order denying the new trial are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES of America, Plaintiff,

v.

Roy L. WILLIAMS, Joseph Lombardo, Thomas F. O'Malley, and Andrew G. Massa, also known as Amos Massa, Defendants.

No. 81 CR 269.

United States District Court, N.D. Illinois, E.D.

June 17, 1983.

Defendants, who were convicted after jury trial of conspiracy to bribe United States senator, travel in interstate commerce with intent to commit bribery, and nine counts of wire fraud, filed motion for new trial on grounds of newly discovered evidence. The District Court, Prentice H. Marshall, J., held that: (1) defendants failed to demonstrate that newly acquired evidence came to their knowledge only after trial and that it could not have been discovered earlier; (2) defendants lacked standing to contest illegal entry that new evidence uncovered; (3) conversations intercepted subsequent to illegal searches were not subject to suppression; (4) defendants lacked standing to challenge illegal entries, or suppress its fruits, not only under Fourth Amendment but also under statute governing wire interceptions and interceptions of oral communication; (5) even if defendants had standing to challenge conduct, suppression was not warranted; (6) Government's failure to disclose unlawful entries did not violate statute which requires disclosure of all previous applications for authorization to intercept conversations or statute which requires approval of Attorney General or his designate; and (7) suppression pursuant to court supervisory power over administration of justice was inappropriate.

Motions denied.

1. Criminal Law 303

Where defendant was murdered after his conviction for conspiracy to bribe United States senator, travel in interstate

commerce with intent to commit bribery, and nine counts of wire fraud, indictment was dismissed as moot. 18 U.S.C.A. §§ 201(b)(1), 371, 1343, 1952.

2. Criminal Law 1083

Although appeal was pending, district court had jurisdiction to deny motion for new trial on grounds of newly discovered evidence on its merits or certify its intention to grant it to Court of Appeals, which could then entertain motion to remand case. Fed. Rules Cr.Proc.Rule 33, 18 U.S.C.A.

3. Criminal Law 938(1)

Where defendants could have raised issue giving rise to their motion for new trial on grounds of newly discovered evidence concerning legality of search which preceded placing of surveillance equipment in their initial posttrial motion but did not, did not seek to inquire during trial or discovery as to how and where surveillance equipment was placed, and defendants had reason to inquire whether Government could have defeated extensive security arrangements in building without taking improper steps, defendants failed to demonstrate requirements for new trials on ground of newly discovered evidence that evidence came to the knowledge only after trial and that they could not have discovered evidence earlier had they exercised due diligence.

4. Criminal Law 394.5(2)

Where defendants who claimed that conduct alleged by Federal Bureau of Investigation agent violated Fourth Amendment rights defendants were required to demonstrate standing to assert violation of Fourth Amendment in order to be entitled to suppression of evidence. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures 7(26)

To establish standing to claim violation of Fourth Amendment, defendants must show that challenged conduct violated

their own legitimate expectations of privacy. U.S.C.A. Const. Amend. 4.

6. Searches and Seizures 7(10)

Fourth Amendment rights are only infringed when something person legitimately expects will remain private is at stake. U.S.C.A. Const.Amend. 4.

7. Searches and Seizures 7(10)

FBI agent's entry into offices on pretext interview and another agent's observations of office from parking lot infringed no expectation of privacy, where pretextual entry to office involved seeing nothing more than any visitor or would see and agent observing office from parking lot just observed what any passerby could see from street. U.S.C.A. Const.Amend. 4.

8. Searches and Seizures 7(10)

Defendant's legitimate expectation of privacy could only be violated by searches of areas they have sought to keep private by using them in way that prevents them from being freely accessible to other people.

9. Searches and Seizures 7(26)

Defendants failed to demonstrate they had standing to contest FBI agent's two surreptitious entries into office, where agent did not enter any of their offices, but rather was only in exterior lobbies and corridors, alarm room and frame room, and there was no showing that any defendant used in any private way areas agent searched.

10. Criminal Law 394.5(2)

Where defendants were not victims of allegedly unlawful search, their intercepted conversations were not seized as fruits of violation of their own right; hence, they had no standing to suppress fruits of those violations. U.S.C.A. Const.Amend. 4.

11. Constitutional Law 42(1)

Purpose of rules governing standing to challenge violation of constitutional rights is to prevent defendants from complaining of violation of someone else's rights.

12. Criminal Law 394.5(2)

Suppression remedy contained in section of Omnibus Crime Control Act governing wire interception and interception of oral communication was intended to be construed consistent with Fourth Amendment principles to standing. 18 U.S.C.A. §§ 2510-2520; U.S.C.A. Const.Amend. 4.

13. Criminal Law 394.5(2)

Where there was no claim that court orders authorizing wiretaps were insufficient on their face or that interceptions were not made in conformity with orders of authorization, and defendants' own expectations of privacy were not infringed by allegedly unlawful search which preceded court orders, defendants lacked standing to challenge unlawful search, or suppress its fruits in form of their intercepted conversations, under either section of Omnibus Crime Control Act governing wire interceptions or interception of oral communications or under Fourth Amendment. 18 U.S.C.A. §§ 2510-2520; U.S.C.A. Const.Amend. 4.

14. Searches and Seizures 7(10)
Telecommunications 491

If search involves no private area, then it invades no interest protected by either Fourth Amendment or section of Omnibus Crime Control Act governing wire interception and interception of oral communication. 18 U.S.C.A. §§ 2510-2520; U.S.C.A. Const.Amend. 4.

15. Searches and Seizures 7(26)

Defendant who alleged he was staying in hotel suite surreptitiously entered by Federal Bureau of Investigation

agent had standing under Fourth Amendment to complain of entry into suite. U.S.C.A. Const. Amend. 4.

16. Searches and Seizures 7(10)

Fourth Amendment prohibits warrantless entries into hotel rooms and offices. U.S.C.A. Const.Amend. 4.

17. Criminal Law 394.1(3)

Defendant seeking suppression of intercepted communications under section of Omnibus Crime Control Act governing wire interceptions and interceptions of oral communications may suppress interceptions which would not have incurred but for unlawful conduct. 18 U.S.C.A. §§ 2510-2520.

18. Criminal Law 394.3

Evidence is "unlawfully intercepted" within meaning of section of Omnibus Crime Control Act governing wire interception and interception of oral communications only where government could not have obtained evidence but for unlawful conduct. 18 U.S.C.A. § 2518(1)(a)(i).

See publication Words and Phrases for other judicial constructions and definitions.

19. Criminal Law 394.1(3)

Unlawful entry by Government to hotel suite did not entitle defendants convicted of conspiracy to bribe United States senator, travel in interstate commerce with intent to commit bribery, and nine counts of wire fraud to any statutory suppression, where none of evidence obtained during entry was introduced at trial and no claim was made that any of the evidence that was introduced at trial was fruit of entry. 18 U.S.C.A. § 2518(1)(a)(i).

20. Telecommunications 519

Once authorization for surveillance under section of Omnibus Crime Control Act governing wire interception and interception of oral communication is issued, government may surreptitiously enter target's premises to plant microphones. 18 U.S.C.A. §§ 2510-2520, 2510(11), 2518(10)(a).

21. Criminal Law 394.1(3)

Where only illegal conduct involved in surveillance of defendants was two entries into offices of insurance company, absent those entries Federal Bureau of Investigation still would have developed information to defeat alarm system in time to intercept all conversations offered at trial, and FBI could easily have slipped into offices and planted microphones without ever having to defeat alarm system, Government would have intercepted conversations offered at trial absent unlawful conduct; therefore, suppression of intercepted evidence was not required. 18 U.S.C.A. § 2518(10)(a)(i).

22. Telecommunications 514

Congress, in enacting oral interception and interception of oral communication procedures provision of Omnibus Crime Control Act, intended Government to disclose prior applications since disclosure of history of invasion of target's privacy might make judge more reluctant to authorize further surveillance. 18 U.S.C.A. § 2518(1)(e).

23. Telecommunications 514

Government's failure to disclose unlawful entries in its application for authorization order for wiretap did not violate statute governing procedures for wire interceptions and interceptions of oral communication. 18 U.S.C.A. § 2518(1)(e).

24. Criminal Law 394.1(3)

Even if statute governing procedures for interception of oral communication were violated by Government's failure to

disclose unlawful entries in its application for authorization order, where failure to disclose did not enable Government to obtain surveillance it would not otherwise have been able to obtain, suppression of intercepted conversations was not warranted. 18 U.S.C.A. § 2518(1)(e), (10)(a)(i).

25. Telecommunications 512

Purpose of statute which requires approval of Attorney General or his designate to be obtained before application for electronic surveillance is submitted to court is to insure that senior official reviewed application and determined that proposed intrusion on target's privacy was warranted before electronic surveillance was authorized. 18 U.S.C.A. § 2516(1).

26. Telecommunications 512

Failure of Government to disclose unlawful entries to Attorney General's designate did not violate statutory requirement that approval of Attorney General or his designate be obtained before application for electronic surveillance is submitted to court. 18 U.S.C.A. § 2516(1).

27. Searches and Seizures 7(7)

Warrant application which contains intentional or reckless misstatement of facts is void under Fourth Amendment only if misrepresentations or omissions are material to application in sense that warrant would not have issued absent misrepresentations or omissions. U.S.C.A. Const.Amend. 4.

28. Searches and Seizures 7(7)

Failure to disclose unlawful entries in application for wiretap did not void application on grounds that warrant application which contains intentional or reckless misstatements of fact is void under Fourth Amendment, where probable cause to conduct surveillance still existed, and means independent of unlawful entries existed for installation of microphones. U.S.C.A. Const.Amend. 4.

29. Criminal Law 394.1(1)

Where there is source for evidence government seeks to offer which is independent of unlawful conduct, Fourth Amendment does not require suppression of fruits of unlawful search or seizure. U.S.C.A. Const.Amend. 4.

30. Criminal Law 394.3

Assuming defendants had standing to make fruit of poisonous tree argument based on unlawful entry of office building, where Government had sources which it used to obtain information necessary to plant microphones independent of unlawful entries, and Government was authorized to break into offices and to do what was necessary to plant microphone after court order was issued, even absent illegalities, intercepted communications were not subject to suppression as fruits of unlawful entries. U.S.C.A. Const.Amend. 4.

31. Criminal Law 394.5(2)

Where defendants lacked standing to challenge unlawful entry to offices, and also failed to demonstrate nexus between unlawful conduct and evidence consisting of intercepted conversation used against them at trial, exercise of court's supervisory power over administration of justice to suppress intercepted conversations was not appropriate.

Douglas P. Roller, Gary Shapiro, Mark Vogel, U.S. Dept. of Justice, Chicago, Ill., for plaintiff.

Thomas A. Wadden, Jr., William F. Krebs, Wadden, Scherr, Krebs & Gitner, Washington, D.C., for defendant Williams.

George J. Cotsirilos, Robert M. Stephenson, Cotsirilos & Crowley, Ltd., Chicago, Ill., for defendant Massa.

William Hundley, Lawrence Gondelman, Hundley & Cacheris, P.C., Washington, D.C., for defendant O'Malley.

Frank W. Oliver, Northfield, Ill., Judith Halprin, Halprin, Halprin & Cantor, Chicago, Ill., for defendant Lombardo.

MEMORANDUM OPINION

PRENTICE H. MARSHALL, District Judge.

[1] On December 15, 1982, a jury found defendants Roy L. Williams, Joseph Lombardo, Thomas F. O'Malley and Andrew G. Massa guilty of conspiracy to bribe a United States Senator, travel in interstate commerce with intent to commit bribery, and nine counts of wire fruad, in violation of 18 U.S.C. §§ 201(b)(1), 371, 1343 and 1952 (1976).[1] Defendants filed multiple individual motions for a new trial, in arrest of judgment and for a judgment of acquittal under Fed.R.Crim.P. 29(c), 33 and 34. All of the motions were denied on January 26, 1983 save one in which all defendants sought a new trial because of alleged post verdict contact between a juror and a witness. That motion was denied on March 31, 1983. A four week sentencing hearing ensued, and, on March 31, 1983, defendants were sentenced to various periods of incarceration. Thereafter, all defendants filed timely notices of appeal to the United States Court of Appeals for the Seventh Circuit.

[2] On April 13, defendants O'Malley and Massa filed their third motion for new trial under Fed.R.Crim.P. 33[2] which has been joined by all defendants. The motion is based on what defendants characterize as newly discovered evidence. The parties have briefed the question of whether the "evidence" that has been submitted in support of the motion

---

[1] Allen M. Dorfman was also convicted on these charges. He was murdered on January 20, 1983 and the indictment was dismissed as moot as to him.

[2] The court on motion of a defendant may grant a new trial to him if required in the interest of justice. . . . A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial on any other grounds shall be made within 7 days after verdict of finding of guilty or within such further time as the court may fix within the 7-day period. Fed.R.Crim.P. 33.

warrants a new trial.[3]

I

Defendants' "newly discovered evidence" consists of the affidavit of H. Edward Tickel ("Tickel"), which we take as true for present purposes.[4] In 1978 and 1979 Tickel was a Special Agent of the Federal Bureau of Investigation ("FBI") stationed in Washington, D.C. In October 1979, while he was in Chicago on other FBI business, he was told by other FBI agents that he might be asked to assist in breaking into a large office building in order to place microphones in several offices as part of electonic surveillance in an ongoing investigation. It later developed that the building was located at 8550 W. Bryn Mawr Avenue, in Chicago, which housed, inter alia, the offices of Allen Dorfman's Amalgamated Insurance Company, the Central States Pension Fund and the International Brotherhood of Teamsters.

When Tickel next returned to Chicago, he learned that the agents had acquired a magnetic card which enabled them to enter the building from the basement parking area and had obtained permission to use an office on the fourth floor of the building, belonging to the Milk Producers Association. During this period, Tickel and other agents used the card to enter the building and go up to the fourth floor office on several occasions. Tickel also used the locks in the milk Producers' office to make a master key for the entire building.

---

[3] Though there is an appeal pending in this case, we have jurisdiction to either deny the motion on its merits or certify our intention to grant it to the court of appeals, which could then entertain a motion to remand the case. *United States v. Ellison*, 557 F.2d 128, 132 (7th Cir.), *cert. denied*, 434 U.S. 965, 98 S.Ct. 504, 54 L.Ed.2d 450 (1977).

[4] We consider the affidavits the government has filed in opposition to the motion only to the extent they are not controverted by the Tickel affidavit. We have resolved all issues of credibility in favor of Tickel.

After testing his key on other locks in the building, Tickel and one or two other FBI agents went down to the second floor offices of their target, Amalgamated Insurance Company, where they used the key to enter the reception area by a door that led from the common stairwell. Tickel observed the security camera and locks on Amalgamated's doors, determined that he could make a key that would open the doors, and left.

In order to study Amalgamated's security system further, Tickel soon returned to Amalgamated, accompanied by another agent, on a pretext interview. While pretending to be interested in an insurance claim, Tickel observed the office.

During either December or January, Tickel returned to Chicago and was told that another entry into Amalgamated's offices would be required to learn more about its security systems. FBI agents had been watching Amalgamated's offices from the building's parking lot, and had learned that every day the cleaning persons would leave the doors to the stairs open and part of the suite unattended.[5] Therefore, Tickel took advantage of this opportunity to enter the offices, while in communication with agents in the parking lot who watched to see if any cleaning persons might return and catch Tickel. Tickel used his master key to enter the alarm room, and studied the alarm system to learn if there were any back-up systems in addition to the main system, and to learn details regarding the main system.

Tickel then left the alarm room and went to the telephone frame room, which he entered with his master key. He checked

---

[5] Tickel also alleges that agents surveilled Amalgamated from the space near the second floor stairwell. However, no allegation is made that this surveillance was necessary to learn what the FBI did learn about the cleaning persons. Since surveillance of the cleaning persons during Tickel's surreptitious entry was done solely from the parking lot, it appears the surveillance from the stairwell was superfluous and did not assist the FBI in obtaining any evidence.

this room for back up alarm equipment. After finishing in the frame room, Tickel left the building.

Tickel told the FBI's alarm expert what he learned during this entry, and from his conversations with the expert Tickel concluded that this information enabled the expert to understand and hence to defeat Amalgamated's alarm system. Tickel also learned that the other agents had learned the location of the telephone line that connected Amalgamated's alarms with its alarm company's monitoring system by talking to the telephone company, and had rented room space and telephone lines near this line in order to monitor the line and eventually defeat it.

On April 7, 1979, then Chief Judge James B. Parsons granted the government's request that the FBI be authorized to enter surreptitiously Amalgamated's offices and place microphones in the private offices of Allen Dorfman and William Webbe. Tickel returned to Chicago on April 11 and assisted other agents in placing these "bugs."

Some months later, Tickel returned to Chicago, on November 7, 1979, to assist the FBI in making a "technical survey" of a suite of hotel rooms at the Sheraton-O'Hare in Chicago which the FBI anticipated would soon be the subject of a court order authorizing electronic surveillance. The next day, Tickel purchased some key blanks, then went to the suite when no one was there and made a key for the doors. He did not enter the suite on that occasion, but did return on November 9 and entered the suite with his key to reconnoiter it. Subsequently the Department of Justice refused to approve the surveillance, and the surveillance equipment was never placed in the suite.[6]

---

[6] In November 1980 the FBI again requested approval to place electronic surveillance equipment in the suite and that Tickel be dispatched to assist in the placement. This request was denied and Tickel never went out to Chicago.

Defendants claim that this evidence, if true, would establish that the electronic surveillance in this case was tainted by government misconduct, and, as a result, the fruits of this surveillance should not have been admitted into evidence at trial.

II

The parties agree that the standards for a rule 33 motion are demanding.

> The defendant[s] must show that the evidence (1) came to their knowledge only after trial; (2) could not have been discovered earlier had defendants exercised due diligence; (3) is material, and not merely impeaching or cumulative; and (4) would probably lead to an acquittal in the event of a retrial. As recognized in *United States* v. *Curran*, 465 F.2d 260, 262 (7th Cir.1972), these standards reflect the fact that such motions "are not favored by the courts and are viewed with great caution."

United States v. Oliver, 683 F.2d 224, 228 (7th Cir.1982).

The first two elements go to the question of whether it is appropriate for defendants to raise the new evidence at this time. We doubt that either element is satisfied in this case.

[3] First, defendants must show that the evidence came to their knowledge only "after trial." The motion was not filed until April 13, 1983, two weeks after defendants were sentenced. Yet they had learned of Tickel's allegations approximately three months earlier, *see* Motion of Defendants O'Malley and Massa for a New Trial ¶ 3, shortly after the verdict was returned. Thus, it appears that defendants could have raised this issue in their initial post-trial motions which were not due to be filed until January 11, 1983 and certainly prior to or during the sentencing hearing (which ran intermittently from February 7 through March 31). But they did not.

While it is unclear whether the pendency of the post-trial proceedings should provoke the conclusion that defendants did not learn of the evidence "after trial" and hence cannot raise

the issue under rule 33, at a minimum we think we should express our displeasure at defendants' failure to raise the issue—which was known to them—until after sentencing. We may have discretion to deny the motion on this basis alone. We choose not to do so. But we observe that multiple and belated motions for new trial are looked upon with disfavor because they are not in the interests of the orderly administration of justice.[7]

We also question defendants' assertion that they could not have discovered this evidence earlier had they exercised due diligence. At no point during the weeks of extensive pretrial proceedings concerning the legality of the electronic surveillance in this case nor during the trial when the parties, court and jury were concerned with the audibility and credibility of the recordings of the intercepted conversations, did defendants seek to inquire as to how and where the surveillance equipment was placed in Mr. Dorfman and Mr. Webbe's offices. Had defendants sought such information, we might well have permitted them extensive discovery on the question, which might have disclosed Tickel's name and enabled defendants to contact him.[8] Defendants—all of whom worked in or frequently visited

[7] This is the 199th written motion presented by the parties in the course of this litigation. Each has received individual attention and a ruling (oral or written) stating the reasons therefor.

[8] In fact, the discovery we did permit defendants on other issues revealed Tickel's name and involvement in the placement of bugs. Williams' suggestion in his reply memorandum that we limited discovery is incorrect. While we did limit discovery as to wiretaps that did not produce evidence to be offered at trial, and as to the government's confidential informers, we in no way limited defendants' discovery of the details of the surveillance that did produce the evidence offered against them. Moreover, at the suppression hearing and before trial we did eventually order disclosure involving confidential informants and other electronic surveillance.

the building—were undoubtedly aware of the extensive security arrangements at Amalgamated and hence would have reason to inquire whether the government could have defeated them without taking improper steps.[9]

Defendants' present argument that they had no reason to question the government's good faith or adherence to law is disingenuous at best. At every step of the way in this case defendants have attacked the government's good faith and adherence to the law. Defendants sought and obtained extensive discovery because they refused to accept the government's assertions prior to the suppression hearing that it had complied with the law. Their failure to explore the placement of the microphones prior to now is not the product of due diligence.

While defendants have failed to demonstrate the first two elements required for a new trial under rule 33 and *Oliver,* we nevertheless will consider and decide the remaining issues presented by the motion, both to provide the court of appeals with a complete record for its review and hence obviate the necessity for a remand should it decide that the motion was properly presented, and because defendants' allegations of governmental misconduct raise important issues in the administration of justice that should be addressed. *See generally United States v. Turner,* 490 F.Supp. 583, 609 (E.D.Mich.1979), *aff'd mem.,* 633 F.2d 219 (6th Cir.1980), *cert. denied,* 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981).

The Tickel affidavit certainly does not contain merely cumulative or impeaching evidence. The allegations are entirely new to the case and raise a ground for suppressing

[9] Moreover, the pre-discovery motion to suppress discovery which defendants did receive revealed that the microphones were placed in Dorfman's and Webbe's offices only a few days after Chief Judge Parsons' April 7 order. The speed with which the microphones were placed should have alerted defendants to the possibility that the government might have begun the process of placing them prior to April 7, given defendants' knowledge of the security system.

evidence which we have not previously considered. The final question under rule 33 is whether this evidence would probably lead to the acquittal of defendants. If defendants are correct that the new evidence requires the suppression of all fruits of the microphone surveillance after April 7, and all surveillance, both telephonic and oral, that resulted from applications filed after April 7, then evidence critical to the government's case would have been excluded and defendants might well have been acquitted. Furthermore, defendants urge that the Tickel allegations reflect so adversely upon the government's good faith in intiating the electronic surveillance in this case that we should reconsider our entire ruling on the motion to suppress and exclude all of the surveillance evidence. Accordingly, we must decide whether defendants are correct that the Tickel allegations warrant the suppression of evidence offered by the government at trial.

III

[4] Defendants are entitled to suppress evidence only if they demonstrate that they have standing to assert the illegality of conduct alleged by Tickel. Since defendants claim that this conduct violates the fourth amendment,[10] they must demonstrate standing to assert a violation of the fourth amendment.

[5, 6] To establish standing defendants must show that the challenged conduct violated their own legitimate expectations of privacy. "[T]he defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party."

[10] "The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const.amend. IV.

United States v. Payner, 447 U.S. 727, 731, 100 S.Ct. 2439, 2444, 65 L.Ed.2d 468 (1980) (emphasis in original). *See Rawlings v. Kentucky,* 448 U.S. 98, 104-06, 100 S.Ct. 2556, 2561-62, 65 L.Ed.2d 633 (1980); *United States v. Salvucci,* 448 U.S. 83, 91-92, 100 S.Ct. 2547, 2552-53, 65 L.Ed.2d 619 (1980); *Rakas v. Illinois,* 439 U.S. 128, 129, 143-48, 99 S.Ct. 421, 423, 430-32, 58 L.Ed.2d 387 (1978). Fourth amendment rights are only infringed when something a person legitimately expects will remain private is at stake. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

[7] Applying these principles, it is clear that much of the conduct alleged by Tickel violates no fourth amendment interests of defendants. Tickel's entry into the offices on a pretext interview involved seeing nothing more than any visitor or customer would see, and the fourth amendment permits a government agent to pose as a customer and enter business premises open to customers of defendants. *See Lewis v. United States,* 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966).[11] Also, the agents' observations of Amalgamated from the parking lot infringed no expectation of privacy; the agents just observed what any passerby could see from the street. *See United States v. Scherer,* 673 F.2d 176, 181 (7th Cir.), *cert. denied,* 457 U.S. 1120, 102 S.Ct. 2935, 73 L.Ed.2d 1334 (1982).

[8, 9] Even as to Tickel's two surreptitious entries[12] into Amalgamated, defendants have failed to demonstrate their

---

[11] Our court of appeals has twice recently reaffirmed this proposition. *See United States v. Swart,* 679 F.2d 698, 701 (7th Cir. 1982); *United States v. Scherer,* 673 F.2d 176, 181-82 (7th Cir.), *cert. denied,* 457 U.S. 1120, 102 S.Ct. 2935, 73 L.Ed.2d 1334 (1982).

[12] We address only Tickel's first two entries because the third—Tickel's entry into Mr. Dorfman and Webbe's offices to plant the microphones—was done pursuant to court order and there is no contention that it was unlawful absent prior unlawful behavior.

standing. While we have no doubt that defendants had a legitimate expectation of privacy in their own offices, *see Mancusi v. DeForte,* 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968), Tickel did not enter any of their offices; he was in only the exterior lobbies and corridors, the alarm room and the frame room. Defendants' legitimate expectations of privacy can only be violated by searches of areas thay have sought to keep private by using them in a way that prevents them from being freely accessible to other people. *See, e.g., United States v. Haydel,* 649 F.2d 1152, 1154-55 (5th Cir.), *corrected,* 664 F.2d 84 (1981), *cert. denied,* 455 U.S. 1022, 102 S.Ct. 1721, 72 L.Ed.2d 140 (1982); *Wilson v. Health & Hospital Corp. of Marion County,* 620 F.2d 1201, 1208-14 (7th Cir.1980); *United States v. Vicknair,* 610 F.2d 372, 380-81 (5th Cir.), *cert. denied,* 449 U.S. 823, 101 S.Ct. 83, 66 L.Ed.2d 25 (1980); *United States v. Garcia-Rodriquez,* 558 F.2d 956, 960 (9th Cir. 1977). No showing is made that any defendant used the areas Tickel searched in any private way. Since no defendant worked in the areas Tickel searched, or used those areas in any private way, each lacks standing to challenge the search. *See United States v. Cella,* 568 F.2d 1266, 1283 (9th Cir. 1977); *United States v. Cohen,* 516 F.2d 1358, 1366 (8th Cir. 1975); *United States v. Britt,* 508 F.2d 1052 (5th Cir.), *cert. denied,* 423 U.S. 825, 96 S.Ct. 40, 46 L.Ed.2d 42 (1975); *United States v. Lefkowitz,* 464 F.Supp. 227, 230-31 (C.D.Cal.1979), *aff'd,* 618 F.2d 1313 (9th Cir.), *cert. denied,* 449 U.S. 824, 101 S.Ct. 86, 66 L.Ed.2d 27 (1980). *See also United States v. Cook,* 498 F.Supp. 1057, 1058-59 (S.D.Tex. 1980), *modified and aff'd on other grounds,* 657 F.2d 730 (5th Cir. 1981). For example, in *United States v. Alewelt,* 532 F.2d 1165, 1168 (7th Cir.), *cert. denied,* 429 U.S. 840, 97 S.Ct. 114, 50 L.Ed.2d 109 (1976), our court of appeals held that the defendant had no legitimate expectation of privacy in the outer area of his office where he had placed his coat on a coatrack.[13] Neither do defendants allege any propriet-

[13] In *United States v. Rosenberg,* 416 F.2d 680 (7th Cir.1969),

(Footnote continued on following page)

ary interest in the premises searched which might accord them standing. *See Rakas v. Illinois,* 439 U.S. 128, 143 n. 12, 99 S.Ct. 421, 430 n. 12, 58 L.Ed.2d 387 (1978).[14] Since defendants have not shown that they used the areas searched in any way that created a legitimate expectation of privacy, they lack standing to challenge the search since it did not infringe their fourth amendment rights.[15]

(Footnote continued from preceding page)

the court held that the defendant had standing to challenge the search of an office he did not work in because he was the person at whom the search was directed, relying on *Jones v. United States,* 362 U.S. 257, 260-61, 80 S.Ct. 725, 730-31, 4 L.Ed.2d 697 (1961), which it read to hold that a target of a search has standing to contest it. However, that aspect of *Jones* was repudiated in *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). *Rosenberg* also appears to be inconsistent with *Alewelt.* Thus, we conclude that *Rosenberg* is no longer good law. *See also United States v. Cortina,* 630 F.2d 1207, 1215 n. 5 (7th Cir.1980).

[14] Allen Dorfman, who is no longer a defendant, was the only individual in the case to assert a proprietary interest in Amalgamated. *See United States v. Dorfman,* 542 F.Supp. 345, 393 n. 56 (N.D.Ill.1982).

[15] This holding is also supported by the line of cases holding that a search of common areas of secured apartment buildings does not violate any legitimate expectation of privacy of a tenant, since the areas Tickel searched were in effect common areas. *See United States v. Acevedo,* 627 F.2d 68, 69 n. 1 (7th Cir.), *cert. denied,* 449 U.S. 1021, 101 S.Ct. 587, 66 L.Ed.2d 482 (1980); *United States v. Luschen,* 614 F.2d 1164, 1173 (8th Cir.1980) *United States v. Penco,* 612 F.2d 19, 24-25 (2d Cir.1979); *United States v. Eisler,* 567 F.2d 814, 816 (8th Cir.1977) *United States v. Shima,* 545 F.2d 1026, 1029 (5th Cir.), *cert. denied,* 434 U.S. 996, 98 S.Ct. 632, 54 L.Ed.2d 490 (1977); *United States v. Calhoun,* 542 F.2d 1094, 1100 (9th Cir.1976), *cert. denied,* 429 U.S. 1064, 97 S.Ct. 792, 50 L.Ed.2d 781 (1977); *United States v. Cruz Pagan,* 537 F.2d 554, 557-58 (1st Cir.1976); *United States v. Anderson,* 533 F.2d 1210, 1214 (D.C.Cir.1976); *United States v. Freeman,* 426 F.2d 1351 (9th

(Footnote continued on following page)

[10] Defendants argue that even if they lack standing to directly challenge the search, since it developed information used to place microphones and intercept their conversations, the conversations must be suppressed as fruits of a poisonous tree under the rule of *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

While the interception of defendants' own conversations infringes their legitimate expectations of privacy, *see Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), in the instant motion defendants do not challenge the interceptions directly, but rather argue that the interceptions are the fruits of a prior fourth amendment violation which we have held they do not have standing to challenge. We know of no authority that holds that a defendant may suppress evidence seized from him as a fruit of a violation of fourth amendment rights which he does not have standing to challenge. There is ample authority to the contrary. *See United States v. Chase,* 692 F.2d 69 (9th Cir.1982) (per curiam); *United States v. Congote,* 656 F.2d 971, 975-76 (5th Cir.1981); *United States v. Hansen,* 652 F.2d 1374, 1386-87 (10th Cir.1981); *United States v. Shovea,* 580 F.2d 1382, 1385-86 (10th Cir.), *cert. denied,* 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978); *United States v. Tortorello,* 533 F.2d 809, 815 (2d Cir.1976); *Gissendanner v. Wainwright,* 482 F.2d 1293, 1297-99 (5th Cir.1973); *United States v. Brown,* 425 F.2d 1172, 1174 (9th Cir.1970) (per curiam); *Jacobs v. Warden,* 367 F.2d 321 (4th Cir.1966); *United States v. Agapito,* 477 F.Supp. 706, 713 (S.D.N.Y.1979) *aff'd,* 620 F.2d 324 (2d Cir.), *cert. denied,* 449 U.S. 834, 101

(Footnote continued from preceding page)

Cir.1970); *United States v. Conti,* 361 F.2d 153, 157 (2d Cir.1966), *vacated on other grounds,* 390 U.S. 204, 88 S.Ct. 899, 19 L.Ed.2d 1035 (1968); *Polk v. United States,* 314 F.2d 837 (9th Cir.), *cert. denied,* 375 U.S. 844, 84 S.Ct. 96, 11 L.Ed.2d 72 (1963); *United States v. St. Clair,* 240 F.Supp. 338 (S.D.N.Y.1965). *But see United States v. Carriger,* 541 F.2d 545 (6th Cir.1976).

S.Ct. 107, 66 L.Ed.2d 40 (1980). *See also United States v. Davis,* 617 F.2d 677, 689-90 (D.C.Cir.1979). This rule has its origin in *Wong Sun* itself, where the Court held that heroin unlawfully taken from another was admissible against Wong Sun because the evidence had not been derived from a violation of his own rights. *Wong Sun* in turn was an outgrowth of *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1961), where the Court wrote,

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

Id. at 261, 80 S.Ct. at 731.

Here, defendants were not victims of Tickel's allegedly unlawful search. Their conversations were not seized as fruits of a violation of their own rights. Hence, they no more have standing to suppress fruits of those violations than did Wong Sun. While it was defendants' own conversations that were seized, allegedly as fruits of the earlier unlawful conduct, at bottom they seek suppression because someone else's rights were violated, and not because their own rights were violated. "In either case, the defendant 'claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.' " *United States v. Chase,* 692 F.2d 69, 70 (9th Cir.1982) (per curiam) (quoting *Jones,* 362 U.S. at 261, 80 S.Ct. at 730).

[11] The purpose of standing rules is to prevent defendants from complaining of a violation of someone else's rights, and that is exactly what defendants are doing here—complaining that their conversations were seized because someone else's rights were earlier violated. The cases do not permit that. Since Tickel's initial searches infringed no protected privacy interest of defendants, use of their fruits likewise does not violate defendants' fourth amendment rights.

Defendants' final argument is that even if they lack standing to seek suppression of evidence under the fourth amendment, they have standing to move to suppress under Title III of the Omnibus Crime Control Act of 1968, as amended, 18 U.S.C. §§ 2510-20 (1976 & Supp. II 1978). Defendants first correctly point out that since their conversations were intercepted by the surveillance equipment installed by Tickel, they are "aggrieved persons" within the meaning of the statute, since " 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." 18 U.S.C. § 2510(11) (1976). The statute goes on to give "aggrieved persons" the right to seek suppression of evidence.

> Any aggrieved person in any trial, hearing or proceeding in or before any court . . . may move to suppress the contents of any wire or oral communication, intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

18 U.S.C. § 2518(10)(a) (1976). Since no claim is made in the pending motion that Chief Judge Parsons' orders were insufficient on their face or that the interceptions were not made in conformity with the orders of authorization, defendants must argue that the fact that the microphone interceptions were made possible by Tickel's allegedly unlawful conduct means that the communications were unlawfully intercepted within the meaning of § 2518(10)(a)(i) and that the communications and all evidence derived therefrom must be suppressed.[16]

---

[16] *Since the oral interceptions allegedly made possible by the*

(Footnote continued on following page)

[12-14] Defendants' statutory argument suffers from the same flaws as their constitutional standing argument. Nothing in Title III governs Tickel's conduct directly; Title III governs only electronic surveillance. Nothing in the statute governs unlawful entries of property. Thus, Title III does not accord defendants standing to challenge the unlawful entries in themselves. *See United States v. Scafidi,* 564 F.2d 633, 638 (2d Cir.1977), *cert. denied,* 436 U.S. 903, 98 S.Ct. 2231, 56 L.Ed.2d 400 (1978).[17] Defendants therefore can argue only that their conversations were unlawfully intercepted because the interceptions were made possible by Tickel's earlier unlawful conduct which they do not have standing to challenge under Title III or the Constitution. This is exactly the same as the fruits of the poisonous tree argument we rejected above, and it must be rejected here as well. the suppression remedy contained in Title III was intended to be construed consistently with fourth amendment principles of standing. *See Alderman v. United States,* 394 U.S. 165, 179 n. 9, 89 S.Ct. 961, 969 n. 9, 22 L.Ed.2d 176 (1969); Sen.Rep. No. 1097, 90th Cong., 2d Sess. 96 (1968), *reprinted in* 1968 U.S.Code Cong. & Ad.News 2112, 2185.[18] In *Alderman,* which was a wiretap case governed by

---

(Footnote continued from preceding page)

alleged unlawful conduct were used to obtain surveillance authorizations subsequent to April 7, surveillance authorized by those orders must also be suppressed if the oral interceptions are suppressed. *See United States v. Giordano,* 416 U.S. 505, 529-33, 94 S.Ct. 1820, 1833-35, 40 L.Ed.2d 341 (1974).

[17] Since Title III does not regulate entries, one court has questioned whether properly authorized electronic surveillance can ever be suppressed under Title III, regardless of whether the surveillance equipment was unlawfully placed. *See United States v. London,* 424 F.Supp. 556, 560 (D.Md.1976), *aff'd sub nom. United States v. Clerkley,* 556 F.2d 709 (4th Cir.1977), *cert. denied,* 436 U.S. 930, 98 S.Ct. 2830, 56 L.Ed.2d 775 (1978).

[18] In fact, this is the law of the case. *See United States v. Dorfman,* 542 F.Supp. 345, 393 n. 56, 394 (N.D.Ill.1982).

Title III, the Court cited as controlling the principles of *Wong Sun* and *Jones*. *See* 394 U.S. at 472-76, 83 S.Ct. at 409-11. In an earlier appeal in this case, the court of appeals held that a person's standing under the statute is measured by whether his own privacy interests have been infringed by the interception, *see United States v. Dorfman*, 690 F.2d 1217, 1228-29 (7th Cir.1982), a test that tracks the constitutional requirement that defendants' legitimate expectations of privacy be infringed. Since standing under Title III tracks fourth amendment standing, the same principles which indicate that as a constitutional matter defendants lack standing to suppress conversations which were intercepted as the fruits of the violation of someone else's rights mean that defendants lack standing to assert statutory suppression. Indeed, a long line of cases have held that Title III does not confer standing to suppress one's own conversations when they are intercepted as fruits of a violation that one does not have standing to challenge. *See United States v. Civella*, 648 F.2d 1167, 1171-72 (8th Cir.), *cert. denied*, 454 U.S. 867, 102 S.Ct. 330, 70 L.Ed.2d 168 (1981); *United States v. Williams*, 580 F.2d 578, 583 n. 21 (D.C.Cir.), *cert. denied*, 439 U.S. 832, 99 S.Ct. 112, 58 L.Ed.2d 127 (1978); *United States v. Fury*, 554 F.2d 522, 525-26 (2d Cir.), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2978, 53 L.Ed.2d 1095 (1977); *United States v. Abramson*, 553 F.2d 1164, 1170 (8th Cir.), *cert. denied*, 433 U.S. 911, 97 S.Ct. 2979, 53 L.Ed.2d 1095 (1977); *United States v. Plotkin*, 550 F.2d 693, 694-95 (1st Cir.), *cert. denied*, 434 U.S. 820, 98 S.Ct. 61, 54 L.Ed.2d 76 (1977); *United States v. Wright*, 524 F.2d 1100, 1102 (2d Cir.1975); *United States v. Scasino*, 513 F.2d 47 (5th Cir.1975); *United States v. Lanese*, 385 F.Supp. 525 (N.D.Ohio 1974); *United States v. Ceraso*, 355 F.Supp. 126, 127 (M.D.Pa.1973); *United States v. Iannelli*, 339 F.Supp. 171, 177 (W.D.Pa.1972), *aff'd*, 477 F.2d 999 (3d Cir. 1973), *aff'd*, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). *See also Scott v. United States*, 436 U.S. 128, 135 n. 10, 98 S.Ct. 1717, 1722 n. 10, 56 L.Ed.2d 168 (1978), *United*

States v. Phillips, 479 F.Supp. 423, 433-37 (M.D.Fla.1979).[19] Since defendants' own expectations of privacy were not infringed by the allegedly wrongful conduct at issue, they lack standing to challenge the conduct, or suppress its fruits, under either Title III or the fourth amendment.[20]

[15] Thus far our standing discussion has concerned the conduct described by Tickel at Amalgamated. The entries into the Sheraton-O'Hare hotel suite present a different siutation. Defendant Williams alleges that he was staying in the suite. A guest in a hotel room has standing to contest an unlawful search

---

[19] The only authority that comes close to being to the contrary is *United States v. Scafidi*, 564 F.2d 633, 639 (2d Cir.1977), where the court assumed but did not decide that a defendant has standing to challenge surveillance made possible by an unlawful entry that the defendant did not have standing to contest. *Scafidi* overlooks *Fury* and *Wright*, however, which are earlier decisions of the same court to the contrary. Since *Scafidi* does not purport to even decide the question, it hardly could have overruled *Fury* and *Wright*. The only one of these cases defendants discuss is *Civella*. They characterize it as a case where nothing was ever seized from defendants. However, in *Civella* defendants were intercepted, and argued that the order authorizing the interception was tainted by prior unconstitutional conduct. That is exactly the same argument made here, and the *Civella* court rejected it. *See* 648 F.2d at 1172.

[20] Since only Allen Dorfman had a proprietary interest in the premises searched, at most only he had standing to challenge the conduct at issue. Defendants try to argue that they were like lessees of Dorfman, and rely on Justice Jackson's view that tenants in a building have standing to challenge an unlawful entry. *See McDonald v. United States*, 335 U.S. 451, 458-59, 69 S.Ct. 191, 194-95, 93 L.Ed. 153 (1948) (concurring opinion). Not only was this view never adopted by the Court, but it is infected by reliance on property rights and notions of trespass and curtilage, which used to control the law of fourth amendment standing. This conceptual scheme was repudiated by the Court in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Under the privacy analysis of *Katz*, Justice Jackson's view must be rejected. If the search involved no private area, then it invaded no interest protected by either the fourth amendment or Title III.

of the room. *See Hoffa v. United States*, 385 U.S. 293, 301, 87 S.Ct. 408, 413, 17 L.Ed.2d 374 (1966); *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951). Accordingly, Williams has standing to complain of the entry into the Sheraton-O'Hare suite.

IV

[16] Assuming defendants have standing to challenge the conduct alleged by Tickel, not all of it was unlawful. As our holding on standing indicates, the observation of Amalgamated from the parking lot and the pretext interview infringe no interest protected by the fourth amendment or Title III. The use of the magnetic card and the offices of the Milk Producers was also lawful. The uncontroverted affidavit of a representative of the Milk Producers indicates that he gave FBI agents permission to use the offices, card and the common areas of the building after they disclosed that they were agents and needed his assistance in their investigation. *See* Affidavit of James R. Box.[21] However, the government concedes that warrantless entries into Amalgamated's offices and the hotel suite would have been unlawful. There is no question but that the fourth amendment prohibits warrantless entries into hotel rooms, *see United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951), and offices, *see Mancusi v. DeForte*, 392 U.S. 364, 88

[21] Defendants do not claim Mr. Box is lying in his affidavit. Tickel does allege that the FBI obtained the Milk Producers' help by means of a "ruse," but does not describe the "ruse," nor do defendants explain why the "ruse" was unlawful. Finally, since Tickel does not claim any personal knowledge of the "ruse," he is not competent to testify on this subject, and any testimony he could give would be inadmissible hearsay. Thus, the Box affidavit is essentially uncontroverted.

S.Ct. 2120, 20 L.Ed.2d 1154 (1968).[22] Hence, the statutory violation in no way enabled the government to intercept conversations that it otherwise would not have intercepted and did not merit suppression of those conversations. *See id.* at 435-36, 97 S.Ct. at 671-72.

[**18**] Similarly, in *United States v. Chavez*, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380 (1974), where the government misidentified the Department of Justice official who had approved the application for authorization of surveillance in the application, in violation of 18 U.S.C. § 2516(1) (1976), the Court held that since the government could have obtained authorization had it correctly identified the official, and since incorrect identification did not enable the goverment in that case to obtain interceptions it might otherwise not have obtained, suppression was unwarranted. *See id.* at 575-80, 94 S.Ct. at 1856-58.

The Supreme Court has written,

> [W]e think Congress intended to require suppression where there is failure to satisfy any of these statutory requirements that *directly and substantially implement* the congressional intention to limit the use of intercept procedures to those situations calling for the employment of this extraordinary investigative device.

United States v. Giordano, 416 U.S. 505, 527, 94 S.Ct. 1820, 1832, 40 L.Ed.2d 341 (1974) (emphasis added). Thus, *Donovan* and its predecessors indicate that evidence is "unlawfully intercepted" within the meaning of § 2518(1)(a)(i) only where the government could not have obtained the evidence but for unlawful conduct.[23]

---

[22] While warrantless entries may be permissible in exigent circumstances, no contention is made that such circumstances were present here.

[23] Other courts have read *Donovan* and its predecessors this way.

(Footnote continued on following page)

[19] Under this test, it is clear that the unlawful entry at the Sheraton-O'Hare does not entitle defendants to any statutory suppression. There is simply no allegation that this entry enabled the government to obtain any of the evidence used at trial. None of the evidence obtained during the entry was introduced at trial and no claim is made that any of the evidence that was introduced at trial was a fruit of this entry. Thus, we need only consider the unlawful entries at Amalgamated in determining whether defendants, assuming their standing, are entitled to statutory suppression.

VI

Defendants' first argument in support of statutory suppression is the poisonous tree argument discussed above. The government's inability to obtain some of the evidence used at trial, but for the unlawful entries, would make that evidence "unlawfully intercepted" within the meaning of § 2518(10(a)(i)[24] However, defendants' showing that the microphones could not have been installed in Dorfman's and Webbe's offices and the evidence used at trial could not have been obtained but for the illegality is deficient.

First, the Tickel affidavit and uncontroverted affidavits submitted by the government indicate that the FBI had independent sources for all of the information supplied by Tickel as a result of the unlawful entries. The affidavits indicate that the government was able to enter the building with the Milk Producers' magnetic card, that a confidential informant gave it

---

(Footnote continued from preceding page)

See, e.g., United States v. Feldman, 606 F.2d 673, 680-81 (6th Cir. 1979), *cert. denied*, 445 U.S. 961, 100 S.Ct. 1648, 64 L.Ed.2d 236 (1980); *United States v. Picone*, 560 F.2d 998 (10th Cir.1977); *United States v. Acon*, 513 F.2d 513, 517-19 (3d Cir. 1975).

[24] *But see* note 17, *supra*.

information needed to defeat Amalgamated's alarm system, and that the phone company also gave it information that enabled it to defeat the system. The affidavits indicate that these independent sources not only could have been but in fact were used to defeat the alarms and place the microphones after the April 7 order was issued.[25] Thus, defendants have not shown that the unlawful entries enabled the government to obtain evidence that it would not have lawfully obtained absent the illegality.

[**20, 21**] Second, even if entries into Amalgamated were necessary to learn about Amalgamated's alarm system, there is no showing that they would not have been speedily accomplished legally after the April 7 order issued. It is clear that once an authorization for Title III surveillance issues, the government may surreptitiously enter the target's premises to plant microphones. *See Dalia v. United States,* 441 U.S. 238, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979). In essence, the only conduct that we have held to be illegal is the two entries into Amalgamated, the first to observe the reception area, and the second to enter the alarm and frame rooms. There is no reason that, absent the earlier entries, the government would not have speedily and lawfully had Tickel enter the building and do exactly the same things he alleges he did earlier to enable the FBI to defeat the alarm system. Indeed, there is no reason it all could not have been done in one day, and no contention that, absent the unlawful entries, the government would not have installed the microphones as soon as was practicable. Certainly, there is no reason to believe that the government would

---

[25] Defendants argue that these affidavits may be false. However, they make no showing that that is the case; certainly nothing in the Tickel affidavit contradicts the claim that these independent sources of information existed, and as to the magnetic card and the phone company, the Tickel affidavit in large part corroborates the government's affidavits.

not have performed the necessary entries by April 18,[26] which is the earliest oral interception which was offered at trial.[27] Thus, absent the earlier entries the FBI still would have developed the information to defeat the alarm system in time to intercept all of the conversations offered at trial. Finally, the Tickel affidavit indicates that the unlawful entries were entirely unnecessary. The parking lot surveillance revealed that the cleaning people left the doors unlocked, the alarm off and the offices unattended every day.[28] Tickel used this fact to enter the office the second time. That being the case, the FBI would easily have slipped into the offices and planted the microphones immediately after April 7 without ever having to defeat the alarm system. Thus, the government would have intercepted the conversations offered at trial absent the unlawful conduct. Suppression is unwarranted.

VII

[22] Defendants contend that the government's failure to disclose the unlawful entries in its April 7 application for a Title III authorization order violated 18 U.S.C. § 2518(1)(e) (1976). The statute requires disclosure of "all previous applications . . . for authorization to intercept" conversations. The

---

[26] The Tickel affidavit does not allege that the FBI could not have defeated the alarms by April 18. Defendants speculate to that effect by arguing that it was six months between the time Tickel first became involved in the case and the time the alarms were defeated. The explanation for this is clear—prior to April 7 there was no urgency about defeating the alarms and the agents were working on other cases. There is no showing that if it had to, the FBI would not have defeated the alarms in the period from April 7 to 18.

[27] No contention is made that any interception prior to April 18 was material to any of the applications for electronic surveillance subsequent to April 7.

[28] The parking lot surveillance was entirely lawful. *See* parts III and IV, *supra*.

unlawful entries clearly were not "applications." However, while defendants concede that the government did not violate the letter of the statute, they argue that it undermined its underlying purpose. Congress intended the government to disclose prior applications since disclosure of a history of invasion of the target's privacy might make the judge more reluctant to authorize further surveillance. *See United States v. Bellosi,* 501 F.2d 833, 838-39, (D.C.Cir.1974).

[23] Defendants' argument must be rejected for three reasons. First, it is at odds with the language of the statute. The statute requires disclosure of no more than prior "applications." We have previously construed the statute to require disclosure of no more than what it says on its face—prior applications for surveillance. *See United States v. Dorfman,* 542 F.Supp. 345, 400 (N.D.Ill.1982).[29] We see no reason to depart from that holding.

Second, defendants' proposed construction of the statute is unworkable. Defendants propose that the statute be read as if it said "invasions of privacy" rather than "applications." No workable definition of "invasion of privacy" is proposed. The concept is so amorphous that it would be practically impossible for FBI agents to comply with the statute.[30]

[24] Third, even if the statute were violated, this would not justify suppression. Had the FBI disclosed the prior entries to Chief Judge Parsons, it would have not provided any reason for him to refuse to authorize the surveillance. He could have ordered the FBI to use its independent sources of information to defeat the alarm system, or conduct additional entries to defeat the system after receiving authority. Because the FBI

---

[29] We know of no authority to the contrary. Even *Bellosi,* the only case on which defendants rely, involved an "application."

[30] Moreover, if the concept were to be construed consistently with fourth amendment jurisprudence regarding legitimate expectations of privacy, then defendants' privacy had not previously been invaded for the reasons discussed in our holding on the standing issue.

could have defeated the alarm system without relying on the unlawful entries, there is no reason to believe Chief Judge Parsons would have concluded that the April 7 application was tainted by the unlawful entries had they been disclosed to him. The failure to disclose the entries did not enable the government to obtain surveillance it would not have otherwise been able to obtain and hence does not merit suppression under § 2518(10)(a)(i).

VIII

[**25**] Defendants argue that the government's failure to disclose the unlawful entries to the Attorney General's designate violated 18 U.S.C. § 2516(1) (Supp. II 1978), which requires that the approval of the Attorney General or his designate be obtained before an application for electronic surveillance is submitted to a court. Defendants correctly note that the purpose of the statute was to ensure that a senior official reviewed the application and determined that the proposed intrusion on the target's privacy was warranted before electronic surveillance was authorized. *See United States v. Giordano,* 416 U.S. 505, 515-23, 94 S.Ct. 1820, 1826-30, 40 L.Ed.2d 341 (1974). Defendants then argue that since the unlawful entries were not disclosed to the Attorney General's designate[31] he was deprived of an opportunity to consider the complete facts when evaluating the application and hence was unable to exercise his independent judgment in the manner Congress intended. Again, defendants' position lacks merit for three reasons.

First, the letter of the statute was complied with here. The Attorney General's designate did approve the applications, which is all the statute requires.[32] Moreover, Congress intended

---

[31] The Attorney General's designate here was former Assistant Attorney General Philip Heymann.

[32] The Attorney General, or any Assistant Attorney General

(Footnote continued on following page)

that beyond ensuring that the authorization was given, courts engage in no review of the authorization decision. The purpose of the statute was to have an official high enough in the Department of Justice to be subject to *political* checks and balances go on the line by authorizing the application. *See Giordano,* 416 U.S. at 520, 94 S.Ct. at 1829. Congress intended the political process, and not the courts, to hold the authorizing official responsible for his decision and to review that decision. Thus, § 2516(1) depends on political and not judicial review.

[**26**] Second, defendants' position is not supported by any authority. To the contrary, courts have consistently held that the government need not even demonstrate that the Attorney General or his designate personally reviewed the application or supporting materials before authorizing investigation. *See United States v. Bailey,* 607 F.2d 237, 241 (9th Cir.1979), *cert. denied,* 445 U.S. 934, 100 S.Ct. 1327, 63 L.Ed.2d 769 (1980); *United States ex rel. Machi v. United States Department of Probation and Parole,* 536 F.2d 179, 184 (7th Cir.1976); *United States v. Feldman,* 535 F.2d 1175, 1180-81 (9th Cir.), *cert. denied,* 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976); *United States v. Turner,* 528 F.2d 143, 150-51 (9th Cir.), *cert. denied,* 423 U.S. 996, 96 S.Ct. 426, 45 L.Ed.2d 371 (1975) *and* 429 U.S. 837, 97 S.Ct. 105, 50 L.Ed.2d 103 (1976); *United States v. Acon,* 403 F.Supp. 1189, 1194-95 (W.D.Pa.1975); *United States v. Garramone,* 374 F.Supp. 256, 259-60 (E.D.Pa. 1974). If the statute is not violated when the Attorney

---

(Footnote continued from preceding page)

specifically designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of [crimes specified herein] .... 18 U.S.C. § 2516(1) (Supp. II 1978).

General's designate does not even bother to look at the application, it could hardly be violated when not all the pertinent information is disclosed to him in the application and supporting materials.

Third, even if the statute had been violated suppression would not be warranted. If the unlawful entries had been disclosed, there is no reason to believe that the Attorney General's designate would have concluded that they should preclude the requested surveillance. Like Chief Judge Parsons, he could have concluded that the government nevertheless had lawful devices at its disposal for defeating the security system. There is no showing that the failure to disclose the entries enabled the government to intercept conversations it would not otherwise have been able to intercept.

IX

Finally, we address defendants' constitutional arguments in favor of suppression. They fall into two categories.

[**27**] First, defendants contend that the failure to disclose the unlawful entries in the April 7 application voids that application under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), which holds that a warrant application which contains intentional or reckless misstatements of fact is void under the fourth amendment.[33]

[**28**] *Franks* is only violated by misrepresentations or omissions that are material to the application in the sense that the warrant would not have issued absent the misrepresentation or omission. *See United States v. Dorfman*, 542 F.Supp. 345,

[33] While *Franks* dealt only with misstatements contained within the four corners of the warrant application, we have previously held that it also reaches omissions. *See United States v. Dorfman*, 542 F.Supp. 345, 367-68 (N.D.Ill. 1982).

365, 378 & n. 32 (N.D.Ill.1982). Under that standard the failure to disclose the entries was not material. The information derived from the entries was not relevant to the facts recited in the applications so it could hardly have been material to Chief Judge Parsons' decision to grant the application. Neither did any of the information learned during the entries detract from or negate the showing of probable cause made in the application. Moreover, as noted in part VI, *supra,* there is no reason to believe that Chief Judge Parsons would not have authorized the surveillance had the entries been disclosed. Since probable cause to conduct the surveillance still existed, and means independent of the unlawful entries existed for installation of the microphones, the unlawful entries would have had no effect on the decision Chief Judge Parsons had to make—whether the government had sufficient reason to invade defendants' privacy by intercepting their conversations.[34]

[**29**] Second, defendants argue that suppression is constitutionally required because the installation of the microphones and interception of conversations by means of them is a fruit of the unlawful entries at Amalgamated and must be suppressed under the rule of *Wong Sun* discussed above. However, where there is a source for the evidence the government seeks to offer which is independent of the unlawful conduct, the fourth amendment does not require suppression of the fruits of an unlawful search or seizure. *See United States v. Crews,* 445 U.S. 463, 471-73, 100 S.Ct. 1244, 1249-51, 63 L.Ed.2d 537 (1980); *Alderman,* 394 U.S. at 183, 89 S.Ct. at 972; *Wong Sun,* 371 U.S. at 487, 83 S.Ct. at 417; *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920). Our court of appeals has noted that this rule has three specific applications.

---

[34] If anything, disclosure of the facts surrounding the entries would only have strengthened the showing of "need for surreptitious entry made in the April 7 application, thereby enhancing the showing made by the government for issuance of the authorization order.

> [C]ontroverted evidence is not fruit of the poisonous tree when (1) the evidence was discovered by an independent source; (2) the evidence is sufficiently distant in causal connection from the illegal search and seizure so that the connection has become so attenuated as to dissipate the taint; or (3) the evidence inevitably would have been gained even without the unlawful search.

United States ex rel. Owens v. Twomey, 508 F.2d 858, 865 (7th Cir.1974). *See also United States v. Piet,* 498 F.2d 178, 181 (7th Cir.1974).

[**30**] Assuming defendants had standing to make this fruit of the poisonous tree argument, they would fail since this case fits into the first and third situations listed in *Owens.* First, the government had sources which it used to obtain the information necessary to defeat Amalgamated's security system and plant the microphones shortly after April 7 independent of the unlawful entries. *See* part VI, *supra.* Second, because the government was authorized to break into Amalgamated and do what was necessary to plant the microphones after the April 7 order was issued, the government would have been able to break into Amalgamated and duplicate the unlawful entries immediately after April 7, thus enabling it to defeat the security system and plant the microphones prior to the date of the first oral interception which was used at trial. *See* part VI, *supra.* Thus, the government would have inevitably planted the microphones and intercepted the conversations that were used against defendants anyway, even absent the illegalities. For these reasons, none of the evidence used by the government need be suppressed as fruits of the unlawful entries at Amalgamated.[35] As noted above, defendants' argument to the contrary is premised on nothing more than speculation that the government would not have been able to plant the microphone

---

[35] As noted in part V, *supra,* the unlawful entry at the Sheraton-O'Hare did not generate anything that was used against defendants in this case. Thus, no evidence used by the government at trial need be suppressed as a fruit of that poisonous tree.

promptly after the April 7 order. Nothing in the Tickel affidavit supports this position and the government's affidavits affirmatively refute it. Defendants

> are unable to suggest any specific basis in support of their claim that the government's evidence at trial might have been tainted .... Although the government has the ultimate burden of persuasion to show that its evidence is untainted, *Alderman v. United States*, 394 U.S. 165, 183 [89 S.Ct. 961, 972, 22 L.Ed.2d 176] (1969), nevertheless [defendants] must come "forward with specific evidence demonstrating the taint." *Id.* Under the circumstances of the present case, where [defendants] failed to provide some minimal demonstration of a basis for their allegation of taint, we cannot say that it [i]s improper for the trial court to decline to hold the extensive evidentiary hearings which [defendants argue are] required.

United States v. DiMuro, 540 F.2d 503, 511 (1st Cir. 1976) (footnote omitted), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 733, 50 L.Ed.2d 749 (1977).[36]

X

[31] The last basis on which defendants seek suppression is this court's supervisory power over the administration of justice. Because the government has engaged in misconduct in the course of the investigation that led to this prosecution, defendants argue that we should suppress its evidence.

Before analyzing the specific contentions, it must be borne in mind that the supervisory power "is not 'a chancellor's foot veto [by the District Court] over law enforcement practices of which it did not approve.' " *United States v. Payner*, 447 U.S.

---

[36] *United States v. Allard*, 634 F.2d 1182 (9th Cir. 1980), relied on by defendants, is distinguishable because there no showing was made that the government would have obtained the allegedly tainted evidence absent the illegality. *See id.* at 1186-87 & n. 6.

727, 750-51, 100 S.Ct. 2439, 2453-54, 65 L.Ed.2d 468 (1980) (Marshall, J., dissenting) (quoting *United States v. Russell*, 411 U.S. 423, 435, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973)). Only if the government's misconduct has some nexus with the evidence offered against these defendants can the power be employed, since "this Court has no general supervisory authority over operations of the Executive Branch," *Payner*, 447 U.S. at 737, 100 S.Ct. at 2447 (Burger, C.J., concurring). *Cf. United States v. Hasting*, ___ U.S. ___, ___ - ___, 103 S.Ct. 1974, 1979, 76 L.Ed.2d 96 (1983) (harmless error doctrine applies to the use of the supervisory power).

Bearing in mind the limitations of the supervisory power, we decline to exercise it in this case for two reasons.

First, because we have held that defendants lack standing to challenge the unlawful conduct at issue, exercise of the supervisory power is inappropriate. The Supreme Court squarely held as much in *Payner*, stating that the defendant's lack of fourth amendment standing also prevented him from invoking the supervisory power.

> Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. [citing *Rakas* and *Alderman*] The value assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment.

447 U.S. at 736-37, 100 S.Ct. at 2447 (citations and footnote omitted). Because defendants do not have standing to challenge the unlawful conduct at issue,[37] we must reject the use of

[37] In *United States v. Cortina*, 630 F.2d 1207 (7th Cir.1980), the evidence at issue was seized directly from defendants; the defendants were themselves the victims of the challenged practices. *See id.* at

(Footnote continued on following page)

the supervisory power "as a substitute for established Fourth Amendment [standing] doctrine." *Id.* at 736 n. 8, 100 S.Ct. at 2446 n.8.[38]

Second, defendants have not demonstrated a nexus between the unlawful conduct and the evidence used against them at trial. In *United States v. Cortina*, 630 F.2d 1207 (7th Cir.1980), on which defendants rely, the court began its discussion of the supervisory power issue by writing,

> One inescapable fact underlies the disposition of this appeal: the search here occurred only because [the government] lied to the magistrate. As the district court found, the affidavit lacked probable cause without its false assertions. This search never should have taken place.

Id. at 1213. That is not the case here. As our prior holdings have made clear, the government could have intercepted the conversations offered at trial even if the unlawful conduct had not occurred, either by using independent sources of information to defeat the alarm system, or by using surreptitious entries to learn about the system after Chief Judge Parsons had issued his orders. Nor did the government make any misrepresentations of fact to Chief Judge Parsons that were material to the decision he had to make on April 7. Had the entries been disclosed, there is no reason to believe his decision would have

---

(Footnote continued from preceding page)

1215-16. Here, no evidence was seized from defendants themselves during the course of the unlawful entries and defendants lack a proprietary interest or an expectation of privacy in the areas searched. This case does not involve the kind of direct search and seizure of defendants' property present in *Cortina*, which was the basis on which *Cortina* distinguished *Payner*.

[38] *See also id.* at 737, 100 S.Ct. at 2447 ("Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. We hold that the supervisory power does not extend so far.").

been any different. Because the evidence used at trial was not in any legally significant sense a product of the governmental misconduct there is no justification to suppress that evidence under the supervisory power. To do so would be to act not because of any effect the misconduct had on the judicial process but merely t express our disapproval of the government's behavior. That is exactly the sort of "chancellor's foot veto" which we should not exercise under the supervisory power.

XI

Defendants have filed a number of motions for discovery in an attempt to obtain evidence which corroborates Tickel's affidavit and which they would use in the evidentiary hearing that they request on their motions for new trial. Since we have held that even if proven the Tickel allegations do not entitle defendants to a new trial there is no need for either discovery or an evidentiary hearing.

Defendants' motions for new trial and discovery are denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 12, 1984

Before

Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*

United States of America,
Plaintiff-Appellee,

Nos. 83-1642, 83-1643, 83-1644, 83-1660, 83-2206, 83-2207, 83-2208, 83-2229

v.

Roy L. Williams, Thomas F. O'Malley, Andrew G. Massa, Joseph Lombardo,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 81 CR 269

Prentice H. Marshall,
Judge.

ORDER

On consideration of the petitions for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendants-Appellants, O'Malley, Massa and Lombardo, and in which defendant-appellant Williams joined (as to the petition filed by O'Malley and Massa), no judge* in active service has requested a vote thereon and all the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

---

* Judge Harlington Wood, Jr. did not participate in the consideration of the petitions for rehearing with suggestions for rehearing en banc.

Office-Supreme Court, U.S.
FILED
NOV 21 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 84-256 and 84-292

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROY L. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

THOMAS F. O'MALLEY AND ANDREW G. MASSA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether electronically intercepted conversations that were evidence of bribery are inadmissible because they were obtained by agents while lawfully executing a warrant that authorized the interception of conversations pertaining to another offense.

2. Whether evidence obtained pursuant to an extension of a warrant authorizing a wiretap must be suppressed on the ground that the application for the extension was insufficient, even though the application established probable cause and any defects in it tended to diminish, not increase, the likelihood that a warrant would issue.

3. Whether the court of appeals applied an incorrect standard in reviewing the district court's determination that statements in a warrant application were not intentionally false or made in reckless disregard of the truth.

4. Whether the admission against petitioners of statements by co-conspirators violated the Confrontation Clause of the Sixth Amendment.

5. Whether petitioners are entitled to relief on the basis of newly discovered evidence of an alleged violation of the rights of a co-defendant who is not before the Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Bose Corp. v. *Consumers Union, Inc.*, No. 82-1246 (Apr. 30, 1984)	15, 16
Franks v. *Delaware*, 438 U.S. 154	14, 15
Ohio v. *Roberts*, 448 U.S. 56	17
Ottomano v. *United States*, 468 F.2d 269, cert. denied, 409 U.S. 1128	18
Rakas v. *Illinois*, 439 U.S. 128	23
Sanson v. *United States*, cert. denied, No. 83-6454 (June 25, 1984)	20
Scott v. *United States*, 436 U.S. 128	8, 10
Segura v. *United States*, No. 82-5298 (July 5, 1984)	23
Tickel v. *United States*, cert. denied, No. 84-509 (Nov. 5, 1984)	20
United States v. *Ammar*, 714 F.2d 238, cert. denied, No. 83-319 (Oct. 1, 1983)	18
United States v. *Bruner*, 657 F.2d 1278	17
United States v. *Burroughs*, 650 F.2d 595, cert. denied, 454 U.S. 1037	17
United States v. *Chavez*, 533 F.2d 491, cert. denied, 426 U.S. 911	8
United States v. *Chavez*, 416 U.S. 562	14
United States v. *Clark*, 531 F.2d 928	10
United States v. *D'Amato*, 493 F.2d 365, cert. denied, 419 U.S. 826	20
United States v. *Donovan*, 429 U.S. 413	14
United States v. *Dorfman*, 690 F.2d 1217	24
United States v. *Giordano*, 416 U.S. 505	11, 12, 13, 14

Cases—Continued: Page

United States v. *Gray*, 484 F.2d 352, cert. denied, 414 U.S. 1158 10
United States v. *Johnson*, 539 F.2d 181, cert. denied, 429 U.S. 1061 10
United States v. *Kelley*, 526 F.2d 615, cert. denied, 424 U.S. 971 18
United States v. *Lurz*, 666 F.2d 69, cert. denied, 455 U.S. 1005 17
United States v. *Marks*, 585 F.2d 164 18
United States v. *Masciarelli*, 558 F.2d 1064 10
United States v. *McKinnon*, 721 F.2d 19 9
United States v. *Payner*, 447 U.S. 727 23
United States v. *Peacock*, 654 F.2d 339, cert. denied, No. 82-1069 (Nov. 7, 1983) 17, 18
United States v. *Perez*, 658 F.2d 654 18
United States v. *Puco*, 476 F.2d 1099, cert. denied, 414 U.S. 844 18
United States v. *Sedovic*, 679 F.2d 1233 10
United States v. *Vadino*, 680 F.2d 1329, cert. denied, 460 U.S. 1082 18
United States v. *Wright*, 588 F.2d 31, cert. denied, 440 U.S. 917 ..... 18, 20
United States v. *Wright*, 667 F.2d 793 10

Constitution, statutes and rules:

U.S. Const.:
Amend. I 16
Amend. IV 21, 24
Amend. VI (Confrontation Clause) 16, 17, 18, 19
Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. 2510 *et seq.* 9
18 U.S.C. 2517(5) 9
18 U.S.C. 2518(1)(f) 11
18 U.S.C. 2518(5) 3, 9
18 U.S.C. 371 2
18 U.S.C. 1343 2
18 U.S.C. 1952 2
18 U.S.C. 4205(c) 2
Fed. R. Evid.:
Rule 801(d)(2)(E) 17, 18, 19
Rule 804(a)(1) 17

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-256

ROY L. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-292

THOMAS F. O'MALLEY AND ANDREW G. MASSA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a)[1] is reported at 737 F.2d 594. The opinion of the district court denying petitioners' motions to suppress

---

[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 84-256.

evidence (Pet. App. 44a-131a) is reported at 542 F. Supp. 345. The opinion of the district court denying petitioners' motion for a new trial (84-292 Pet. App. 41a-80a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41a) was entered on June 8, 1984. A petition for rehearing (Pet. App. 42a-43a) was denied on July 12, 1984. The petition for a writ of certiorari in No. 84-256 was filed on August 16, 1984; the petition in No. 84-292 was filed on August 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on all 11 counts of an indictment charging conspiracy to bribe a United States Senator, in violation of 18 U.S.C. 371; interstate travel to promote the bribery, in violation of 18 U.S.C. 1952; and wire fraud, in violation of 18 U.S.C. 1343 (Pet. App. 1a). Petitioner Williams was sentenced to the maximum term of imprisonment, pursuant to 18 U.S.C. 4205(c), in order to permit a study of his health; the district court indicated that the sentence will be reduced when the study is complete. Pet. App. 6a. Petitioner O'Malley was sentenced to a 30-month term of imprisonment, to be followed by five years' probation. Petitioner Massa was sentenced to imprisonment for a year and a day, to be followed by five years' probation. The district court also fined petitioner Williams $29,000.

The evidence showed that petitioners, together with co-defendants Allen Dorfman and Joseph Lombardo

and unindicted co-conspirator William Webbe,[2] devised and pursued a scheme to bribe a United States Senator at the expense of the Teamsters' Central States Pension Fund.[3] The scheme involved the proposed purchase of a piece of property ("the Wonderworld property") in Las Vegas, Nevada, near the residence of Senator Howard Cannon. Pet. App. 2a-3a. The government's evidence consisted in large part of conversations surreptitiously intercepted and recorded pursuant to court-ordered wiretaps (*id.* at 7a).

1. On January 29, 1979, the government obtained an order authorizing a tap on the telephones at Dorfman's insurance agency. The application for the order stated that there was probable cause to believe that Dorfman was illegally maintaining a hidden interest in three Nevada casinos. The government began monitoring pursuant to this order. Pet. App. 7a.

The order expired after 30 days (see 18 U.S.C. 2518(5)), and the government filed an application for an extension. The application for an extension repeated the allegations contained in the January 29 application but added the allegation of an illegal spe-

---

[2] Dorfman and Lombardo were also convicted on all 11 counts. Lombardo was sentenced to a 15-year term of imprisonment, to be followed by five years' probation, and fined $29,000; his conviction was affirmed, and he has sought certiorari (No. 84-585). Dorfman was murdered prior to sentencing, and his case was dismissed as moot (Pet. App. 2a n.1).

[3] The full name of the Fund is "Central States, Southeast and Southwest Areas Pension Fund" (Pet. App. 2a n.2). It was created by collective bargaining agreements between the Teamsters Union and employers; its function is to pay benefits to retired union members (*id.* at 2a).

cial interest in the Aladdin hotel-casino (Pet. App. 7a-8a). This allegation was stated in an affidavit filed by FBI Special Agent Wacks and was supported by transcripts of conversations overheard pursuant to the January 29 order. The extension application was granted on March 1, 1979. *Ibid.*

The government then obtained a series of 30-day authorizations through 1979 and into 1980. The application of April 28, 1979, was the first to allege that Dorfman and others were involved in a conspiracy to bribe Senator Cannon. Pet. App. 8a. The government also obtained and executed an order authorizing the electronic overhearing of conversations in Dorfman's and Webbe's offices. *Ibid.*

2. The Pension Fund acquired the Wonderworld property in 1972 but lost direct control over its management and disposition in 1977, when the Victor Palmieri Company was retained to manage the Fund's real estate assets. The Pension Fund's trustees relinquished managerial control to Palmieri and retained only the right to monitor Palmieri and to remedy breaches of fiduciary duty. Pet. App. 2a-3a. In 1978, Palmieri decided to sell the Wonderworld property. Nearby homeowners, concerned that a high-rise building would be built on the land, organized a homeowner group, selected Senator Cannon as their spokesman, and decided to purchase the land with a view toward having the zoning of the property changed so that it could not be used for high-rise development (*id.* at 3a). At a homeowners' meeting, Senator Cannon offered to call Dorfman to determine whether the group could buy the property directly from the Pension Fund.[4] In addition, the group agreed to Sen-

[4] Dorfman was not then formally associated with the Fund, but his insurance company had previously insured many of the Fund's assets and had offices in the same building that housed the Fund (Pet. App. 3a).

ator Cannon's suggestion that his son-in-law, Robert Bjornsen, serve as the group's agent for the Wonderworld transaction. In late December 1978, Bjornsen initiated contacts with Palmieri. *Ibid.*

On January 8, 1979, the Palmieri Company invited sealed bids for the Wonderworld property. It set several conditions, including a minimum bid of $1.4 million. Two days later, Senator Cannon met in his Las Vegas office with petitioner Williams, then an international vice-president of the Teamsters Union,[5] Dorfman, and Edward Wheeler, a lawyer who represented the Teamsters on legislative matters. Pet. App. 3a-4a. At the meeting, Wheeler voiced the Teamsters' objections to a legislative proposal, recently introduced in Congress, to deregulate the trucking industry (*id.* at 4a). At the conclusion of the presentation, Wheeler left the office, at Williams's request. Williams, Dorfman, and Senator Cannon remained for another 25 to 45 minutes, discussing the Wonderworld property and the homeowners' effort to purchase the land. Williams and Dorfman, seeking to influence Senator Cannon's actions and decisions on the deregulation legislation, offered the Senator and his group the exclusive right to purchase the Wonderworld property for the minimum bid price of $1.4 million. During the next four months, petitioners, Dorfman, and Dorfman's associate, William Webbe, worked to keep this promise. *Ibid.*

On January 12, 1979, Bjornsen submitted a $1.4 million bid on behalf of the homeowners. A bid of $1.6 million was submitted by investor Allen Glick. Palmieri rejected both bids for failure to comply with

---

[5] Williams subsequently became the international president of the Teamsters. He resigned that position as a condition of admission to bail (Pet. App. 3a n.3). See *United States* v. *Williams*, 565 F. Supp. 350, 353 n.1 (N.D. Ill. 1983).

other bid conditions. In the absence of other complying bids, however, Palmieri continued to negotiate with Bjorsen, the homeowners' agent, and Glick, the high bidder. Pet. App. 4a.

When Glick resubmitted his offer, raising the amount of the down payment, a Palmieri representative accepted the offer and mailed Glick closing documents on January 29, 1979. At this point, petitioners made a concerted effort to effect the withdrawal of Glick's offer. Pet. App. 4a. The next day, Joseph Lombardo, "whose vocational status is something of a mystery" (*ibid.*), proposed to Dorfman that two Pension Fund representatives—petitioner O'Malley, then a Fund trustee, and petitioner Massa, a former trustee—be sent to talk to Glick (*ibid.*). Williams approved the trip and made an airplane available to O'Malley and Massa (*id.* at 5a).

During a dinner meeting with Glick that evening, O'Malley and Massa candidly explained their intentions: they wanted to defeat legislation pending before Senator Cannon's Senate committee that was inimical to the trucking industry; a homeowners group headed by Senator Cannon wanted to purchase the Wonderworld property; and to secure the Senator's appreciation for their intercession, petitioners O'Malley and Massa asked Glick to withdraw his offer. Glick agreed to withdraw the offer and did so the following day. Pet. App. 5a.[6] Thus, by early March 1979, all competitors were removed from the scene, and Palmieri resumed negotiations with Bjornsen (*ibid.*).

---

[6] Subsequently, Glick's partner, Fred Glusman, also withdrew an offer for $1.6 million when Glick told him not to "fight city hall" (Pet. App. 5a).

By then, however, the homeowners had lost interest in purchasing Wonderworld because it appeared that it was going to be zoned to preclude high-rise development in any event (Pet. App. 5a). Nevertheless, Dorfman and Webbe, who were determined to keep their promise to Senator Cannon, helped Bjornsen find a new partner for the purchase—Robert L. Smith, a Las Vegas contractor and business associate of Dorfman (*id.* at 5a-6a). Three bids submitted by Bjornsen on behalf of Smith were rejected by Palmieri because of insufficient down payments, and throughout the final stages of the conspiracy Williams and Dorfman lamented their inability to fulfill the commitment made to Senator Cannon. As late as May 21, 1979, Dorfman assured the Senator that the deal was still "wide open." *Id.* at 6a. On May 25, 1979, however, Palmieri accepted a $1.6 million offer from another corporation, and on July 2 the Wonderworld property was sold (*ibid.*).

3. Before trial, petitioners moved to suppress evidence obtained through electronic surveillance. The district court denied the motion (Pet. App. 44a-131a). The court of appeals affirmed petitioners' convictions, "[f]inding no merit" (*id.* at 2a) in petitioners' various contentions.

ARGUMENT

1. Petitioners contend (84-256 Pet. 9-12)[7] that the district court should have suppressed the contents of 33 conversations overheard pursuant to court orders before April 28, 1979, the date of the first application that alleged a conspiracy to bribe Senator Cannon. Petitioners' argument appears to be that the

---

[7] Petitioners O'Malley and Massa seek to adopt petitioner Williams's contentions (see 84-292 Pet. 3 n.1).

orders did not authorize the recording of these conversations (see 84-256 Pet. 9, 11-12) and that the conversations were not so obviously incriminating that they can be analogized to physical evidence that can be seized if found in plain view (*id.* at 10-11). The court of appeals correctly rejected this contention (Pet. App. 15a-19a).

Petitioners ignore the fact that, as this court has recognized, law enforcement officers engaged in electronic surveillance are not—and cannot possibly be—required to avoid intercepting every conversation that turns out not to be related to the offenses specified in the warrant. Because the significance of a conversation often cannot be determined until it is considered in its entirety and in context, agents conducting electronic surveillance "can hardly be expected to know that [a particular] call[] [is] not pertinent" to the offenses specified in the warrant "prior to [the call's] termination." *Scott* v. *United States*, 436 U.S. 128, 140 (1978); see *United States* v. *Chavez*, 533 F.2d 491, 493 (9th Cir.), cert. denied, 426 U.S. 911 (1976); Pet. App. 16a (citing cases). For example, even if an overheard conversation begins on an innocent note, it may then turn to the subject of the authorized investigation. Or calls may be cryptic or may contain guarded conversation and veiled references; to determine the incriminating character of such a conversation, it may be necessary for the agents to review the recording in light of other evidence. See *Scott*, 436 U.S. at 140.

For these reasons, the mere fact that the agents in this case recorded conversations pertaining to the bribery scheme at a time when they were executing a warrant related to the casino interests does not mean that they acted in an unreasonable or unlawful

fashion. Indeed, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, specifically authorizes the use of intercepted "communications relating to offenses other than those specified in the order" authorizing the surveillance (18 U.S.C. 2517(5)). "Evidence of crimes other than those authorized in a wiretap warrant [is lawfully] intercepted * * * when [it is] the by-product of a bona fide investigation of crimes specified in a valid warrant. Congress did not intend that a suspect be insulated from evidence of one of his illegal activities gathered during the course of a bona fide investigation of another of his illegal activities merely because law enforcement agents are unaware of his diversified criminal portfolio." *United States* v. *McKinnon*, 721 F.2d 19, 23 (1st Cir. 1983) (footnote omitted).

To be sure, agents conducting electronic surveillance may not indiscriminately record every conversation they are able to intercept. They are required to execute the warrant "in such a way as to minimize the interception of communications not otherwise subject to interception" (18 U.S.C. 2518(5)). Moreover, there are statutory limits on the use of intercepted conversations that do not pertain to the offenses specified in the warrant (18 U.S.C. 2517 (5)). But petitioners have not alleged a violation of either of these provisions. See Pet. App. 15a-16a, 19a.

In sum, because the agents complied with the minimization requirement, they executed the warrant in a reasonable fashion, and there was no basis for suppressing the conversations they recorded. Since the 33 conversations concerning the bribery were the product of a reasonable execution of the warrant,

petitioners are incorrect in suggesting that their use at trial must depend on an analogue of the "plain view" doctrine. Petitioners cite three decisions holding that physical evidence that is not described in a warrant, but is in the plain view of officers conducting a search pursuant to a warrant, cannot be seized unless the officers have probable cause at the time of seizure to believe that it is incriminating. 84-256 Pet. 10, citing *United States* v. *Wright*, 667 F.2d 793, 797-799 (9th Cir. 1982); *United States* v. *Clark*, 531 F.2d 928, 932 (8th Cir. 1976); and *United States* v. *Gray*, 484 F.2d 352, 355-356 (6th Cir. 1973), cert. denied, 414 U.S. 1158 (1974). But the justification for the interception and recording of the 33 conversations at issue here is not that there was probable cause, at the time of the interception, to believe that the conversations were incriminating—although the court of appeals suggested that that was true in this case (Pet. App. 17a). Rather, the justification is that the practicalities of electronic surveillance make it reasonable and necessary to allow agents sometimes to record conversations that turn out to be unrelated to the offenses described in the warrant. The limit on the agents' authority is not the requirement of probable cause but the minimization requirement. Contrary to petitioners (84-256 Pet. 11), *United States* v. *Sedovic*, 679 F.2d 1233, 1237 n.4 (8th Cir. 1982); *United States* v. *Masciarelli*, 558 F.2d 1064, 1066-1067 (2d Cir. 1977); and *United States* v. *Johnson*, 539 F.2d 181, 188 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061 (1977), do not suggest that the minimization requirement has been breached if agents record a conversation at a time when they do not have probable cause to believe that it is incriminating; on the contrary, as we have noted, and as this

Court recognized in *Scott*, sometimes even the incriminating nature of conversations that are *related to* the offense described in the warrant will not be revealed until the conversation has been recorded and reviewed in its entirety and in the context of other conversations.

2. 18 U.S.C. 2518(1)(f) requires an application for an extension of an order authorizing a wiretap to include "a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results." This Court has explained that "the function of § 2518 (1)(f) is to permit the court realistically to appraise the probability that relevant conversations will be overheard in the future. If during the initial period no communications of the kind that had been anticipated had been overheard, the Act requires an adequate explanation for the failure before the necessary findings can be made as a predicate to an extension order." *United States* v. *Giordano*, 416 U.S. 505, 532 (1974). Petitioners contend (84-256 Pet. 12-13) that the government's first application for an extension, filed on March 1, 1979, was invalid because it did not include the explanation required by Section 2518(1)(f).

There is no dispute that the government's application for the March 1 extension included a full account of the results obtained to that point. On its face, the language of Section 2518(1)(f)—which specifies that the government must provide such an account *or* an explanation of the failure to obtain results—seems to require no more. Moreover, the government pointed out in the court of appeals that its application for an extension stated, as an explanation for the failure to obtain more complete results,

that Dorfman was away during the entire first 30-day period. See Pet. App. 9a.

Although the court of appeals said that it would "hesitate" to hold that this statement constituted an adequate explanation of the failure to obtain more complete results (Pet. App. 9a), it rejected petitioners' contention for the following independent reasons (*id.* at 9a-10a; footnote omitted):

> [A]llegations concerning the Aladdin hotel-casino were made first in the March 1 application. Special Agent Wacks alleged in his affidavit that the FBI had intercepted conversations pursuant to the January 29 wiretap order that "concerned the promotion and management of hidden and unlawful interests in the Aladdin hotel-casino." Wacks provided the court with transcripts of the conversations, biographical information on the participants, and the meaning of certain veiled references.
>
> Wacks' allegations and the transcripts of conversations formed an ample basis for the Chief Judge's probable-cause finding * * *. The one-month old allegations concerning other casinos were surplus, and any failure to explain the lack of intercepted calls to substantiate the January 29 allegations was rendered immaterial. Apart from the purportedly inadequate § 2518(1)(f) explanation, the defendants cite, and we have discovered, no other statutory deficiency in the government's March 1 submissions. All predicates for a Title III order were thus satisfied and the Chief Judge properly issued the wiretap authorization.

Petitioners assert (84-256 Pet. 12-13) that this reasoning is inconsistent with *United States* v. *Giordano*, *supra*. But the Court's opinion in *Giordano*

explicitly stated that the extension order in that case was invalid because it was a fruit of surveillance conducted pursuant to an invalid initial order (416 U.S. at 531-532): "It is apparent * * * that the communications intercepted pursuant to the extension order were evidence derived from the communications invalidly intercepted pursuant to the initial order." [8] Petitioners do not allege that the showing of probable cause needed to obtain the extension in this case was in any way derived from an earlier illegal surveillance.

Instead, petitioners appear to advocate a blanket rule that evidence obtained through an extension of a wiretap authorization must always be suppressed if the extension application does not contain an explanation of why the initial surveillance did not obtain more complete results. Such a rule would serve no purpose. The judge who considered the extension application in this case had before him the results of the initial surveillance and could see the extent to which they were incomplete. Ordinarly, unexplained incomplete results from the initial wiretap would *undermine* the government's effort to show that it had probable cause to believe that an extension would bear fruit, whereas an explanation for the incomplete results would help the government show probable cause by explaining why the extension might succeed where the initial surveillance did not. This Court has ruled that suppression is the correct remedy

---

[8] The passage that petitioners quote from *Giordano* (84-256 Pet. 13) omits two sentences that make it clear that the basis of the Court's ruling was that there was at least a significant likelihood that the extension order was based on information obtained through execution of the initial, invalid order. See 416 U.S. at 533.

for a violation of Title III only if the violation increases the risk that electronic surveillance will occur in circumstances in which Congress did not intend to authorize it. See *United States* v. *Donovan*, 429 U.S. 413, 432-440 (1977); *United States* v. *Chavez*, 416 U.S. 562, 574-575 (1974); *Giordano*, 416 U.S. at 527. The violation alleged by petitioners has, if anything, the opposite effect; it diminishes the likelihood of the government's obtaining a warrant even when probable cause might exist. Suppression is, therefore, clearly not an appropriate remedy.

3. The March 1, 1979, extension authorized the interception of conversations pertaining to the Aladdin hotel-casino because FBI Special Agent Wacks, in an affidavit supporting the extension application, stated that some conversations overheard during the first 30 days' surveillance concerned the "promotion and management of hidden and unlawful financial interests in the Aladdin hotel-casino" (Pet. App. 10a). This statement proved to be in error; the conversations Special Agent Wacks mistakenly believed were about the Aladdin hotel-casino in fact concerned the conspiracy to bribe Senator Cannon (*ibid.*). Petitioners, relying on *Franks* v. *Delaware*, 438 U.S. 154, 171 (1978), sought to suppress the evidence obtained pursuant to the March 1 order on the ground that Special Agent Wacks's statements were intentionally false or made with reckless disregard for the truth.

The district court discussed the legal principles applicable to this claim as follows (Pet. App. 67a-68a):

> *Franks* provides little guidance as to what constitutes "reckless disregard for the truth." A useful analogy, however, is provided by the principle of first amendment law that liability for a defamatory statement regarding a public figure

> cannot be imposed unless the plaintiff proves that the defendant acted with reckless disregard for the truth * * *.
>
> [T]his branch of first amendment law * * * indicates that the reckless disregard for truth required by *Franks* is not established by a mere failure to investigate. Rather, it can only be demonstrated if [petitioners] can establish that the government in fact entertained serious doubts as to the truth of the affidavits or had obvious reasons to doubt the accuracy of the information contained therein.

After conducting a hearing, the district court, in a detailed discussion, rejected petitioners' allegations of a *Franks* violation (*id.* at 77a-90a). The court of appeals agreed that the district court had applied the correct legal principles and upheld its determination as not clearly erroneous (*id.* at 11a-15a). Specifically, the court of appeals, after considering the evidence, concluded that the intercepted "conversations by themselves could have led a reasonable person to conclude that Allen Dorfman and his associates were involved in an effort to acquire, promote, or manage a hidden interest in the Aladdin hotel-casino. And Special Agent Wacks' investigation revealed further facts to support such a thesis." *Id.* at 12a.

Petitioners' sole contention (84-256 Pet. 14) is that because this Court held, in *Bose Corp.* v. *Consumers Union, Inc.*, No. 82-1246 (Apr. 30, 1984), that the clearly erroneous standard does not apply to review of a finding of actual malice in the First Amendment area, the court of appeals erred in applying the clearly erroneous standard in this case to review the district court's finding under *Franks*. But the Court's decision in *Bose Corp.* rested primarily

on the Court's traditional willingness to undertake (and to require other appellate courts to undertake) a more searching review of the application of legal standards to particular factual circumstances in First Amendment cases (see slip op. 12-13) and on the extraordinary significance of a decision that certain speech is without First Amendment protection. See slip op. 18-25; *id.* at 19 ("In such cases [involving allegedly unprotected speech], the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited."). Because this is not a First Amendment case, such concerns are not present here.

Moreover, there is nothing in the court of appeals' discussion suggesting that it believed that the district court's findings only marginally satisfied the clearly erroneous standard and would have been reversed under a more exacting standard. On the contrary, it seems clear that the court of appeals would have reached the same conclusion even if it had been required "independently [to] decide" (*Bose Corp.*, slip op. 25) whether the evidence established that Special Agent Wacks acted with reckless disregard for the truth.

4. Petitioners further contend (84-256 Pet. 14-17) that the admission against them of certain of the recorded conversations violated the Confrontation Clause of the Sixth Amendment. Although Webbe and Williams testified at the trial, the other defendants declined to do so and therefore could not be cross-examined on the statements they made during

the recorded conversations. The courts below held that these conversations were not hearsay but were admissible as statements by co-conspirators in furtherance of the conspiracy (Fed. R. Evid. 801(d)(2)(E)), and petitioners no longer take issue with that conclusion.

In *Ohio* v. *Roberts*, 448 U.S. 56 (1980), this Court noted that when hearsay evidence is offered at trial, the Confrontation Clause ordinarily requires a showing that the declarant is unavailable and that his statement bears adequate indicia of reliability. See *id.* at 65-66. The Court added that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66 (footnote omitted). The court of appeals, following established Seventh Circuit precedent, held that co-conspirators' statements constitute a "firmly rooted hearsay exception" within the meaning of *Ohio* v. *Roberts*. See Pet. App. 27a (citing cases).[9] The majority of the courts of appeals have adopted this position. See, *e.g.*, *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982); *United States* v. *Bruner*, 657 F.2d 1278, 1285 & n.8 (D.C. Cir. 1981); *United States* v. *Peacock*, 654 F.2d 339, 349-350 (5th Cir. 1981), cert. denied, No. 82-1069 (Nov. 7, 1983); *United States* v. *Burroughs*, 650 F.2d 595, 597 n.3 (5th Cir.), cert. denied, 454 U.S. 1037 (1981);

---

[9] The co-defendants who chose not to testify were unavailable (see Fed. R. Evid. 804(a)(1)), and in any event the Court stated in *Roberts* that a "demonstration of unavailability * * * is not always required" (448 U.S. at 65 n.7).

United States v. *Marks*, 585 F.2d 164, 170 n.5 (6th Cir. 1978); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). A minority of the courts of appeals have said that they adopt the rule petitioners urge (see 84-256 Pet. 16)—that courts must determine in each case whether the co-conspirator statements bear sufficient indicia of reliability. See, *e.g.*, *United States* v. *Ammar*, 714 F.2d 238, 254-256 (3d Cir.), cert. denied, No. 83-319 (Oct. 31, 1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); *United States* v. *Perez*, 658 F.2d 654, 660-662 & n.5 (9th Cir. 1981).[10]

But as at least one court that has adopted petitioner's position has recognized (see *Wright*, 588 F.2d at 38, quoting *United States* v. *Puco*, 476 F.2d 1099 (2d Cir.), cert. denied, 414 U.S. 844 (1973)), this disagreement among the circuits has so far been more apparent than real, because co-conspirator statements that satisfy Rule 801(d)(2)(E) are often made under circumstances that give adequate assurance of their reliability. Indeed, we know of no case, and

---

[10] Petitioners also rely on *United States* v. *Vadino*, 680 F.2d 1329, 1334 (11th Cir. 1982), cert. denied, 460 U.S. 1082 (1983). Although the court of appeals in that case remarked, in the course of rejecting a Confrontation Clause challenge to the admission of co-conspirator statements, that the statements possessed indicia of reliability, the court did not address the issue raised by petitioners. Had the court addressed that question, it would presumably have recognized that it was bound by the Fifth Circuit's decision in *United States* v. *Peacock*, *supra*.

petitioners cite none, in which a court of appeals has actually held that statements satisfying the requirement of Fed. R. Evid. 801(d)(2)(E) were nonetheless inadmissible by virtue of the Confrontation Clause; in every decision that endorses the position urged by petitioners, the court of appeals found sufficient indicia of reliability and held that the coconspirator statements were admissible.

Moreover, petitioners would not be entitled to relief even in the circuits that have announced that they will undertake a case-by-case inquiry, because there are ample indicia of the reliability of the statements at issue here. First, the critical declarations were corroborated by, or were made in the presence of, each of the defendants. Dorfman characterized the "commitment" that was made to Senator Cannon in similar fashion during conversations with petitioner O'Malley (C.A. App. 175, 178, 194-211), petitioner Massa (*id.* at 191-193), Lombardo (*id.* at 194-195), and Webbe (*id.* at 220-229). Dorfman's characterization was further corroborated by the similar characterization given by petitioner Williams in a recorded conversation with Webbe (*id.* at 186-189).

Second, the declarations were captured on tape, rather than being offered through a third party's recollection. The jury therefore had the opportunity to assess the tone, the exact wording, and the context of the declarations. Moreover, Webbe, a witness who was friendly toward petitioners, testified at length about the many conversations to which he was a party; the jury therefore had that aid in assessing the context and meaning of the declarations.

Finally, the declarations were made during the course of the unlawful conduct in this case. Thus they were trustworthy both because they were

against the penal interests of the declarants (see, *e.g.*, *United States* v. *D'Amato*, 493 F.2d 359 (2d Cir.), cert. denied, 419 U.S. 826 (1974)), and because the comments were roughly contemporaneous with the events being discussed and thus were not likely to be the product of a failure of recollection (see *Wright*, 588 F.2d at 37-38). For these reasons, the co-conspirator statements in this case would be admissible in any circuit.[11]

5. Finally, petitioners O'Malley and Massa contend that the district court abused its discretion in denying their post-judgment motion for a new trial on the basis of newly discovered evidence. The "newly discovered evidence" was an affidavit by former FBI Agent H. Edward Tickel stating that before any Title III authorization was obtained, he had participated in surreptitious entries of Dorfman's offices for the purpose of examining their security systems. Tickel speculated that the information he learned about the alarm and security systems enabled the agents who subsequently installed the surveillance devices authorized by Title III to circumvent the security systems. Pet. App. 38a; 84-292 Pet. App. 52a.[12]

---

[11] This Court recently declined to review a Seventh Circuit decision applying the rule that petitioners challenge. *Sanson* v. *United States*, cert. denied, No. 83-6454 (June 25, 1984). There is no more reason for the Court to review this case.

[12] Tickel executed the affidavit shortly after being convicted of unrelated offenses he committed while he was an FBI agent. See *Tickel* v. *United States*, cert. denied, No. 84-509 (Nov. 5, 1984). The government's response to petitioners' motion for a new trial undertook to demonstrate that Tickel's affidavit was incredible on its face, and the district court's findings, which we describe below, show that it would have

The district court denied the motion without a hearing on numerous grounds (84-292 Pet. App. 41a-80a). Specifically, the court stated that it doubted whether the evidence came to petitioners' attention only after trial (*id.* at 53a-54a); that it doubted whether petitioners had exercised due diligence in uncovering the evidence (*id.* at 54a-55a); and that petitioners lacked "standing" to assert Tickel's alleged actions as a basis for suppressing evidence, since those actions did not violate petitioners' rights under the Fourth Amendment or Title III (*id.* at 56a-65a). In addition, the district court stated (*id.* at 68a-70a; footnotes omitted):

> [Petitioners'] showing that the microphones could not have been installed in Dorfman's and Webbe's offices and the evidence used at trial could not have been obtained but for the illegality is deficient.
>
> First, the Tickel affidavit and uncontroverted affidavits submitted by the government indicate that the FBI had independent sources for all of the information supplied by Tickel as a result of the unlawful entries. The affidavits indicate that the government was able to enter the building with [a] magnetic card, that a confidential informant gave it information needed to defeat Amalgamated's [(Dorfman's offices')] alarm system, and that the phone company also gave it information that enabled it to defeat the system. The affidavits indicate that these independent sources not only could have been but in fact

---

been pointless for the government to have conducted the illegal entries described in Tickel's affidavit. See pages 21-22, *infra*.

were used to defeat the alarms and place the microphones after the [Title III] order was issued. Thus, [petitioners] have not shown that the unlawful entries enabled the government to obtain evidence that it would not have lawfully obtained absent the illegality.

Second, even if entries into Amalgamated were necessary to learn about Amalgamated's alarm system, there is no showing that they would have not been speedily accomplished legally after the [Title III] order issued. It is clear that once an authorization for Title III surveillance issues, the government may surreptitiously enter the target's premises to plant microphones. See *Dalia* v. *United States*, 441 U.S. 238 * * * (1979). * * * There is no reason that, absent the earlier entries, the government would not have speedily and lawfully had Tickel enter the building and do exactly the same things he alleges he did earlier to enable the FBI to defeat the alarm system. * * * Thus, absent the earlier entries the FBI still would have developed the information to defeat the alarm system in time to intercept all of the conversations offered at trial. Finally, the Tickel affidavit indicates that the unlawful entries were entirely unnecessary. * * * [S]urveillance revealed that the cleaning people left the doors unlocked, the alarm off and the offices unattended every day. Tickel [according to his affidavit] used this fact to enter the office [on one occasion]. That being the case, the FBI would easily have slipped into the offices and planted the microphones immediately after [obtaining the warrant] without ever having to defeat the alarm system. Thus, the government would have intercepted the conversations offered at trial absent the unlawful conduct.

The court of appeals stated (Pet. App. 38a): "We could affirm on any of several grounds, but will select the most obvious one—the defendants' lack of standing." This ruling was clearly correct. As this Court held in *United States* v. *Payner*, 447 U.S. 727, 731 (1980) (emphasis in original), a party's "Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party. *Rakas* v. *Illinois*, 439 U.S. [128,] 143 [(1978).]" While Tickel's alleged actions may have violated Dorfman's rights, petitioners do not claim that they had any protected interest in the areas Tickel supposedly entered. They are therefore not entitled to any relief on the basis of Tickel's alleged actions.

Petitioners appear to assert that they are entitled to relief because their conversations were intercepted "as a result of [the] surreptitious entries" (84-292 Pet. 10) or "[a]s a consequence" of the entries (*id.* at 11). But even assuming that petitioners' assumptions are correct—that, contrary to the district court's findings, the surveillance could not have been accomplished without the alleged illegal entries, and that a lawful search is "tainted" if unlawful activity was previously undertaken to remove private security devices that would have foiled the search (cf. *Segura* v. *United States*, No. 82-5298 (July 5, 1984), slip op. 19-20)—petitioners labor under a fundamental misunderstanding of the applicable law. As both courts below noted, it is well established that "a defendant may not successfully challenge the admissibility of evidence on the basis that the evidence is tainted [by] (or 'the fruit of') some past infringement of another's rights." Pet. App. 39a (citing cases); see 84-

292 Pet. App. 60a-61a (citing cases); *id.* at 64a-65a (citing cases).[13] The doctrine that a party may seek suppression only if his own Fourth Amendment rights have been violated necessarily means that evidence directly discovered by an unlawful search of Dorfman's office could be admitted against petitioners. It follows that there is certainly no difficulty in admitting evidence—the contents of the recorded conversations—that was not discovered directly through the alleged illegal search but was supposedly at the end of a speculative causal chain that began with such a search.[14]

---

[13] Petitioners do not take issue with the consistent holding of these cases; instead, they attempt to distinguish them on the ground that "[h]ere, of course, the entire purpose of the unlawful entries was to gather information to facilitate the interception of petitioners' conversations" (84-292 Pet. 13 n.13). But this is just an argument for treating the evidence gained from the electronic surveillance as "fruits" of the unlawful entries. It is not a reason for concluding that the entries themselves violated petitioners' rights under the Fourth Amendment or Title III.

[14] Petitioners' reliance (84-292 Pet. 15-16) on *United States* v. *Dorfman*, 690 F.2d 1217 (7th Cir. 1982), an earlier decision related to this prosecution, is puzzling. In *Dorfman*, the persons seeking to suppress evidence were parties to conversations that, they alleged, were intercepted in violation of Title III (or the Fourth Amendment). They were alleging, therefore, that their own rights had been violated; the only question was whether suppression was the proper remedy. Petitioners fail to allege that the supposed illegal entry violated their rights.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
GLORIA C. PHARES
Attorney

NOVEMBER 1974

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10095